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Supreme Court of the United States

OCTOBER TERM 1918.

THE COLUMBUS RAILWAY, POWER & LIGHT COMPANY,

Appellant,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.,

Appellees.

[No. 715.]

I. TUCKER BURR, ET AL.,

Appellants,

vs.

THE CITY OF COLUMBUS, OHIO, ET AL.,

Appellees.

[No. 739.]

Appeals from the District Court of the United States for the Southern District of Ohio, Eastern Division.

BRIEF FOR APPELLEES, DEFENDANTS BELOW.

STATEMENT OF THE CASE.

As the appellants' statement of the case seems to us to be very incomplete, we take this opportunity of immedi-

ately placing before the court those additional facts which seem material and relevant. As the ruling of the court below on the motion for a temporary restraining order is not before the court, we will confine ourselves to the allegations of the bills of compiaint and to the contents of the two franchise ordinances, which are attached as exhibits to the bills. The correctness of the allegations of the bills we must of course concede for the purposes of the motions to dismiss, the rulings on which are before this court for review.

The subject matter of the two bills is identical with the exception of a few additions and a few omissions in the later bill. The only important difference is that no diversity of citizenship was claimed in the first bill, The Columbus Railway, Power & Light Company being an Ohio corporation and all the defendants being residents of Ohio. After the first case was argued before Judge Westenhaver on a motion to dismiss, and it was apparent that the Judge believed no Federal question was stated in the bill, the second case was filed in the name of citizens of other states who were alleged to be the holders of $200,000 of a first mortgage issue of $1,500,000. The name of the trustee under that mortgage is recited in the petition, but no statement is made as to the corporate existence or residence of such trustee, nor is there any allegation that such trustee has had any notice of the filing of this suit, or refused to be made a party to the suit.

The bills allege that the appellant Company, an Ohio corporation formed for the purpose of constructing and operating a street railway system in the City of Columbus and county of Franklin, owned and operated in the City of Columbus a street railway system, consisting of

110 miles of track, under the terms and provisions of two franchise ordinances, to wit: One known as the Blanket Franchise, passed on February 4, 1901, renewing to The Columbus Railway Company, its successors and assigns, for the term of twenty-five years, the right to maintain and operate under the terms and conditions therein stated street car lines in certain streets of the city, it being one of the stated purposes of the ordinance to provide for the operation under uniform terms and conditions of all the lines of the grantee, formerly exercised under franchises which had expired, would soon expire or were for indeterminate periods; the other known as the Central Market Franchise, passed January 21, 1901, granting to the Central Market Street Railway Company, its successors and assigns, for the term of twenty-five years, the right to construct and maintain a single or double track street railway in certain streets under the terms and conditions therein set forth. All the right, title and interest of the grantees was conveyed by deeds to the appellant Company on January 29, 1914, and March 1, 1907, respectively.

The Blanket Franchise provided (Section 27) that it should take effect only after "the filing by said Columbus Railway Company, with the City Clerk of said city, of its acceptance in writing of each and all the terms, provisions and requirements of this ordinance;" and the Central Market Franchise provided (Section 25) that it should take effect only after "the filing with the City Clerk of said city by said company of a written acceptance of its terms and conditions."

The bills allege that said franchises were duly accepted in writing by the grantees, and that under and by virtue of said franchises the said grantees and their successor,

the appellant Company, operated said street railway systems until August 20, 1918, when the said appellant Company notified the City Council that it had terminated and abrogated said franchise grants.

Each of said franchises provide that the grantee, its successors and assigns, shall during the full term of twenty-five years furnish complete and adequate service for the traveling public, and further sets forth minimum schedules for operation on each of the streets named in the franchise grants. These and other mandatory provisions are set forth in another section of this brief.

As a reason for the attempted surrender of August 20, 1918, to which it is not alleged or claimed that the mortgage trustees consented or even had notice, there is set forth, beginning at Section 9 of the first bill and at Section 10 of the second bill, the increasing costs of operation. In the first bill it is alleged that the mortgages against the Street Railway part of the company's property amount to $7,295,000 with annual interest charges of $353,000, and in the second bill the amount of bonds so apportioned against the street railway property is $8,600,000 and the annual interest charge $400,000. It is alleged that for the year ending June 30, 1918, the net income, after deducting operating costs, taxes and "a proper charge for depreciation," is $341,987.00. This was insufficient to pay the interest on the mortgage bonds by $11,000 under the allegations of the first bill, and by approximately $100,000 under the allegations of the second bill. It is not stated what deduction was made for depreciation, but we may safely assume that their estimate was 5% of the alleged value of the property ($12,000,000), or $600,000. Such depreciation is theoretically a sinking fund for future replacement pur-

cases, so even if we concede that mortgage bonds, issued on the first day of April, 1915, (see paragraph 11 of the second bill) have priority over the claim of the public based on the underlying franchise grants of 1901, there would be a balance of $500,000 in the operating revenues for the year ending June 30, 1918, to stave off the dangers of the insolvency alleged. For the year ending June 30, 1919, it is anticipated that the operating revenues will be insufficient by $250,000 to meet the operating expenses, taxes and a proper charge for depreciation. The "proper charge for depreciation," estimated above at $600,000, is more than sufficient to meet the deficiency of $250,000 and the interest charge of $333,000 as stated in the first bill, and is only $50,000 short of enough to pay the interest charge as stated in the second bill. This is not a bad showing for the lean year of the twenty-five year contract and it emphasizes the elasticity of the "short time" within which bankruptcy is predicted.

In paragraph 10 of the first bill the Company illustrated the increasing cost of operation by comparing the cost of coal and labor for 1916 with that of 1917. By adding the difference in these two bills alone to the net income for the year ending June 30, 1918, we were able to argue to Judge Westenhaver that the Company was making a fair profit in 1916 on its alleged investment, over and above its depreciation and other charges, notwithstanding the abnormal world war prices then existing. As a consequence those allegations do not appear in the second bill.

The big increase in the operating expense for the current year is accounted for by the increase in the wage account. It is alleged in paragraph 11 of the first bill

and paragraph 13 of the second bill that in June, 1918, a controversy arose between the street railway company and its employes, resulting in a strike and discontinuance of service for two days, and "was referred to the National War Labor Board for decision, and that Board on July 31, 1918, rendered its decision the result of which is that plaintiff must increase the wages of its street railway employes more than 50 per cent." As a result of this increased cost it is alleged in the first bill that the operating expenses are not sufficient to enable it to maintain its property in good order and repair and perform its duty as a public utility, and to this there is added in the second bill that further operation at said rates is impractical and "would bankrupt the company within a short time."

On the twentieth of August, 1918, the said appellant Company addresed a notice in writing to the City of Columbus, the Mayor, the City Attorney and the City Council to the effect that it thereby surrendered and cancelled, for the reasons therein stated, both the Blanket and the Central Market Franchises, but that it would continue to operate until notified to withdraw from the streets by the City, and charge passengers riding on its cars a five cent fare and one cent for transfer—a net increase of 62 and 95 per cent, respectively, over the rates agreed upon in the franchise contracts, namely, eight tickets for 25 cents and free transfers.

As a basis of their right of action against these defendants, complainant say in paragraph 14 of the first bill and paragraph 16 of the second bill that the defendants threaten to and will, unless enjoined by this court, attempt to force said Company to continue to operate its street railway property under said Blanket Central Mar-

ket franchises upon all the streets of said city, and to force it to continue to sell eight tickets for 25 cents and to give universal free transfers; and that said threat of the defendants, if carried out, would compel the said Company to carry passengers upon its said lines at unjust, unreasonable, inadequate and confiscatory rates in violation of said Fourteenth Amendment of the Constitution of the United States and to the great and irreparable harm of the plaintiff, as herein set forth. It is not alleged or claimed that the defendants intend to do anything other than to file a suit for the specific performance of the contracts.

By the 19th paragraph of the bill reasons for the jurisdiction of a court of equity are attempted to be stated, but since they are nothing but mere conclusions, and not statements of ultimate facts, it is unnecessary to repeat them.

The main prayer of the bill in each cause is for an injunction, restraining and forever enjoining the defendants from forcing or compelling or attempting to force and compel said appellant Company to operate its lines of street railway under said ordinances, and from enforcing or compelling or attempting to force or compel the said Company to charge and collect the rates of fare prescribed by the said ordinances, and from in any way enforcing or attempting to enforce against said Company the aforesaid two franchise ordinances or either of them, or any provision of either of them.

Judge Westenhaver sustained the City's motion to dismiss the first bill on two grounds, namely, for want of jurisdiction and because no valid cause of action in equity was stated in the bill. Judge Hollister did not enter into a discussion of the jurisdictional question, but based his decision, sustaining the City's motion to dismiss, on the ground that no valid cause of action in equity was stated in the second bill.

ARGUMENT

In opening this argument we cannot refrain from stating our belief that there is here disclosed to this court a case which is unique in the history of the country; and that never were such high-handed tactics used by a public utility company, even in the conscienceless days of the past, as this deliberate scrapping of a contract under which the Company had enjoyed most valuable proprietary rights for seventeen years, and in this attempt to secure the protection of the Federal Courts in its enjoyment, without the contractual restrictions, of the rights conferred by such a contract. Our primary contention is that these appellants have no right of action against the city to enjoin it from proceeding to enforce the contract, inasmuch as the city is guilty of no breach and threatens no arbitrary action, but only that it will proceed by due process of law for the specific performance of the contract.

Our reply to the argument for the appellants, which might properly be used in defense to an action by the city, but not in support of such an affirmative suit by the appellants, may be summarized as follows:

1. Under the Ohio Statutes in force at the time of the passage of these ordinances, and still in force, full power was delegated to Columbus to enter into these franchise contracts, whereby the city and the public should receive street car service for a definite period at an agreed rate of fare in consideration for exclusive proprietary interests in the public streets for a street car system. Such a contract is protected by the impairment clause of the United States Constitution. The power of the city

to make the grant being conceded in appellants argument, the Company is estopped from questioning the agreed provisions.

2. Under the specific provisions of these comprehensive franchises the clear duty is imposed upon the Company to furnish adequate street car service during the entire twenty five years at the fixed rate of fare.

3. The increased cost of operation resulting from the war, together with the award by the National War Labor Board in the wage controversy between the Company and its employes, voluntarily submitted to the Board as a result of the parties being unable to agree on a fair rate of wages, do not constitute a vis major or an implied condition not in contemplation of the parties, resulting in the termination of the contract. The economic effect of war upon prices is not a vis major, nor does the settlement of a wage controversy, which the appellants should have settled themselves in order to perform their public duty without cessation, constitute such a force. Nor is there an implied condition which would authorize this court to relieve the Company from what is temporarily a hard bargain.

4. No surrender of the franchises was effected by the letter of August 20th, 1918, for the following reasons: (a) For the reasons stated in subdivisions 1, 2 and 3, the franchises cannot be terminated without the city's consent; (b) If the franchises were only permissive, or could be terminated on the ground of an implied condition, the attempted surrender by the Company is not effective, because (1) the consents of the mortgage trustees, who represent large investments based on the franchise rights, have not been secured nor have said trustees been made parties to this suit or otherwise notified

of the procedure of the appellant Company, so that they can enforce the franchise contracts against the city, there having been no cessation of operation, (Old Colony Trust Co. vs. Omaha, 230 U. S., 100), and (2), the verbal destruction of the franchises is ineffective to relieve the appellants from the obligations thereof, while they still continue to enjoy the privileges received at the time of their acceptance.

We are willing to concede that this year is **the** lean year of this twenty-five year contract, but that is certainly no reason for the cancellation of this contract, even if this court, in such a case as this, could relieve a party from a hard bargain. In the statement of the case we called attention to the fact that the "proper charge for depreciation" concealed a big fund which would tide the Company over this lean year, and postpone very materially the "short time" period in which bankruptcy is threatened. This "short time" period has now been tested, and has already outlasted the war, and now bids fair to outlive war prices. This test illustrates most strongly the unfair menace to all contracts, which would result from an approval by this court of the new and radical propositions of law contended for by these appellants.

THE JURISDICTIONAL QUESTION.

In the first case deprivation of property without due process of law in violation of the Fourteenth Amendment is depended upon as establishing the Federal question and the right of action as well, while in the second case diversity of citizenship is alleged for the Federal question, but the right of action still depends upon the Fourteenth Amendment. As the motions to dismiss

raised both the question of jurisdiction and the merits of the cases, namely, whether a cause of action is stated in favor of the appellants in each case, we propose to state our propositions under this heading very briefly.

As to the first case we contend that there is no real and colorable, but only a fraudulent and fictitious Federal question stated in the bill, and that the jurisdiction of the court has not attached for any purpose. This rule is recognized in the cases cited by Judge Westenhaver and by opposing counsel. Penn Mutual Life Insurance Co. vs. Austin, 168 U. S. 685; Siler vs. Louisville & Nashville R. R. Co. 213 U. S. 175, 191.

We contend further, in the words of Judge Westenhaver, (page 86):

> "And even when the threatened act may be the impairment of a contract, or the deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a Federal Court. Such seems to me to be the present case."

For authority see the following: **St. Paul Gas Light Co. vs. St. Paul**, 181 U. S., 143; **Defiance Water Co. vs. Defiance**, 191 U. S., 184; **Des Moines vs. Des Moines, etc., R. R. Co.**, 214 U. S., 179.

The cases last cited are exactly in point against the contention of counsel in the court below that the city's action in enforcing the contract was the wrong complained of, while now the wrong seems to be their own agreement. This later contention is disposed of by the case of **Interstate Consolidated Street Railway Co. vs. Mass.** 207 U. S. 79; 52 L. Ed. 111:

> Syllabus. "A street railway company whose charter subjects it to 'all the duties, liabilities, and restrictions set forth in all the general laws now or

hereafter in force, relating to street railway companies', is bound by the requirements of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconsitutional as to already existing corporations."

Opinion page 84:

"This court is of the opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. * * * The railroad company would have come into being and has consented to come into being subject to the liability, and could not be heard to complain. Rockport Water Co. vs. Rockport, 161 Mass., 279; Ashley vs. Ryan, 153 U. S. 436, 443; Wight vs. Davidson, 181 U. S. 371, 377; Newburyport Water Co. vs. Newburyport, 193 U. S. 561, 579."

Certainly then this Company, and its privies, will not be heard to complain that the considerations, which the Company and its predecessors agreed to give for valuable grants, are unlawful or deprives them of their property without due process of law. It follows that this Federal question is not colorable, but wholly fraudulent and fictitious, as Judge Westenhaver held.

Coming now to their former theory of the case, namely, that the city's threat to enforce the contract was an act depriving them of due process of law. It is not alleged that the city will take any arbitrary action, or will pass any measures which have the force and effect of laws, so as to subsequently deprive the parties of existing rights. In the absence of such allegations it must be assumed, as Judge Westenhaver stated, that the city will proceed through the regular channels of the law to enforce the

contract; and the duty in such case is imposed by the statutes of Ohio upon the city solicitor, **Section 4312 of the General Code** providing as follows:

> "When an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, the solicitor shall likewise apply for the forfeiture or the specific performance thereof as the nature of the case requires." (Note: the words "shall likewis apply" refers to these words of the preceeding section: "The solicitor shall apply in the name of the corporation to a court of competent jurisdiction for etc.")

This case is therefore on all fours with the St. Paul, the Defiance and the Des Moines cases above cited. In fact in those cases the cities took one more step by passing ordinances or resolutions declaring their several intentions not to recognize existing contracts. In the **Defiance** case (Defiance Water Co. vs. Defiance, 191 U. S. 184) the city had begun its action in the courts through the city solicitor attacking the contract of the Water Company. In the **Des Moines** case (Des Moines vs. Des Moines City Ry. Co., 214 U. S. 179) the street railway franchise rights were questioned by an ordinance of council which ordered the company to remove its tracks in twenty-five days and, upon its failure so to do, directed the city solicitor to proceed to enforce the city's rights. In that case this court said that no jurisdiction was warranted because there was no assumption that the city solicitor would do more than proceed by suit to test the rights of the company.

How then will suits to enforce these contracts violate the due process of law guaranty of the Fourteenth Amendment? The procedure of the city is the very es-

sence of due process, and we submit that no colorable Federal question is made in the first case.

In the second case diversity of citizenship is alleged as the ground of Federal jurisdiction. The allegations of the bill are identical with those in the first case, and it is apparent that this case was filed "for the sole purpose of founding a jurisdiction which otherwise would not exist."

The first questions that suggests itself in this case is the status of the appellants, and their right of action. They are the holders of bonds in the amount of approximately $200,000 of a first mortgage issue of $1,500,000, under the terms of which mortgage the Gerard Trust Company is the trustee. The corporate existence and residence of the trustee is not set forth in the bill. The Company's action in surrendering the city franchises, if effective, would seriously endanger the security of the whole mortgage issue. The Company then is impairing the obligation of a contract, in which the Gerard Trust Company, as trustee for all the bondholders, has a very vital interest.

It is held by this court in the case of **Old Colony Trust Co. vs. Omaha**, 230 U. S. 100, that the trustee in a mortgage on the property of a lighting company can maintain suit on the company's franchises, although the company lost in the prior suit, if the mortgage rights were acquired before that suit and the trustee had not been made a party. In that case the city attempted to terminate the franchise rights.

Assume then for the purpose of argument that the city accepted the surrender of its franchises by the appellant company. There is no allegation that the mortgage trustees in this case has any knowledge of the Company's

action. Certainly it did not join in the letter sent to Council, as its signature is absent from the exhibit in this case, and certainly it is no party to either of these suits. In view of the fact that the Company still continues operation, and the surrender of the franchises has been merely verbal, cannot the trustee resist an action by the city for the forfeiture of the franchises?

One case has been cited by opposing counsel in which a suit by bondholders to enjoin trespassing by strikers on the property mortgaged endangering a mortgage security, was sustained on the ground that the action was outside of the duty imposed upon the trustee. (Carter vs. Fortney, 170 Fed. 463.) This case is entirely different, in that the surrender of the mortgage security itself is proposed by the parties to these suits. No one but the trustee can make this decision for the bondholders.

It is thus apparent that there is no right of action whatever in these bondholders; and further that the Company's paper surrender of the franchises is no surrender at all.

The opinion in the case of **Dawson vs. Columbia Trust Co., 197 U. S. 178,** has an important bearing in that it very conclusively disposes of a collusive attempt of the mortgagee of the Dawson Water Works Company to found Federal jurisdiction on the ground of diversity of citizenship for the purpose of avoiding a prior decision. This suit was dismissed for want of jurisdiction on the ground that:

> "The waterworks company is deemed to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings and arrange the parties according to their side in the dispute. When that is done it is obvious that the waterworks company is on the plaintiff's side

and was made a defendant solely for the purpose of re-opening in the United States Court a controversy which had been decided against it in the courts of the state."

The reasoning of the above opinion can be applied with equal force to the present case.

UNDER OHIO STATUTES FULL POWER DELEGATED TO CITIES TO ENTER INTO BINDING STREET RAILWAY FRANCHISE CONTRACTS

These franchise contracts were entered into in 1901, and the Ohio statutes in relation thereto in force at that time are to be found in Bates' Revised Statutes of 1897. They appear in full in the margin of the opinion of this Court in the case of Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, 48 Law Ed. 1102, 1106 and 1107. The right of cities to enter into street-railway franchise contracts under the power conferred by those statutes, and the binding effect of such contracts on the parties thereto was determined by this court in that case.

Certainly after reading these statutes no reasonable person can entertain a doubt as to the policy adopted by the Legislature of Ohio in relation to street railways. Every section evinces the Legislature's intent to vest the city with complete proprietary control for the benefit of and as the business agent of the public. The city was vested with the title of all the exclusive property rights it was necessary for a street railway company to acquire in order to construct and operate its system in the public streets. That low rates of fare for the benefit of the public was to be the consideration for the grant of such exclusive property rights is apparent by the re-

peated reference to the subject of rates. That such a contract is an exercise of the proprietary function, rather than the governmental function, is emphasized by the cases cited in the next subdivision.

This power was delegated to cities, and this intention of the Legislature was manifested as early as 1861, when the first street railway law was enacted (58 O. L. 66). Section 5 of this Act provided:

> "That hereafter no street railway shall be constructed or commenced until the consent of the city and council or corporate authorities of the city, town or village, wherein such road is to be constructed shall have been first obtained; and it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railway company * * * desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals shall construct and operate a street railroad in such city, town or village; * * *."

This law was next supplemented in the year 1866 (63 O. L. 55), and repeatedly thereafter until at the time of the granting of these franchises Ohio had the complete set of statutes, which appear in the margin of Bates' Revised Statutes of 1897, the important feature of which may be summarized as follows:

> "Section 2501: No corporation, individual, or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission and prescribed the terms and condition upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys which shall be used and occupied; and the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interests."

Section 2502: This section requires certain preliminaries on the part of city officials before the street railway route can be established; required public notice of the application for a franchise, and further that, "no such grant as mentioned in said preceeding section shall be made except to a corporation, individual, or individuals, that will agree to carry passengers upon such proposed railway at the lowest rate of fare." It provides further that, "no grant or renewal of any grant" shall be valid for a greater period than twenty-five years, and "that after such grant or renewal of grant is made the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant."

Section 2505 authorizes the councils of cities to grant permission by ordinance for the extension of existing street railways if deemed by the council to be beneficial to the public, and provides that the rate of fare for carrying passengers on the line so extended shall not be increased by reason of such extension.

> "Section 3443: Council, or the commissioners, as the case may be, shall have power to fix the terms and conditions upon which such street railways may be constructed, operated, extended and consolidated."
>
> "Section 3443-12: Such street railway companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies; provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation."

THESE CONTRACTS WERE MADE BY THE CITY IN ITS PROPRIETARY CAPACITY

We emphasize this proposition because opposing counsel concede that in such a case the appellants are not deprived of "due process of law" and the basis of their action therefore fails. (See page 7 of their brief, also page 76.) If these franchises are contracts, made by the city in the exercise of its proprietary power, then they are not governmental acts depriving the appellants of the "due process of law", but the very acts of the appellants themselves, estopping them from denying the validity of any of the terms and conditions. The contractual and proprietary nature of the relationship of the parties under these franchises eliminates the objection Mr. Justice Holmes had to the majority opinion in the case of Interstate Consolidated Street R. Co. vs. Massachusetts (207 U. S. 79). It conclusively negatives the right of appellants to claim that their own promises denied them the "due process of law."

This theory that an Ohio city's function in entering into a street railway franchise contract is proprietary, is established by a recent decision of the Ohio Supreme Court, quoting opinions of this court in support of its position. The case I refer to is **Interurban Railway & Terminal Co. vs. Public Utilities Commission of Ohio,** decided June 21, 1918, 98 O. S. 287; Ohio Law Reporter of December 9th, 1918, page 447. The facts in this case were that the Village of Pleasant Ridge granted a franchise to an interurban company upon the condition that, in case of annexation to the City of Cincinnati, the company should not charge a rate of fare in excess of 5 cents. After annexation was affected, the company re-

fused to comply with this provision and the City of Cincinnati brought an earlier action in the Common Pleas Court, which is known as Interurban Co. vs. Cincinnati, 93 O. S. 108, to enjoin the charging of the increased fares. The company's answer in that case set up the fact that it was required to pay 3 cents of this fare for the use of the tracks of another company in Cincinnati, and that the enforcement of the fare would drive it into bankruptcy, and in fact had driven it into the hands of a receiver at the time it sought to file an amended petition in the Court of Appeals. The court affirmed the judgment in favor of the city.

Thereafter the company began the suit, first referred to above, before the Public Utilities Commission, asking said Commission to exercise the governmental rate-making power, alleged to have been vested in it by the State Legislature, to the extent of increasing the rate of fare so as to make the same compensatory. The city's demurrer to the complaint was sustained by the Commission, and its decision affirmed by the Supreme Court. The following are the branches of the syllabus relating to this branch of the argument:

> 3. "A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the Constitution, and the police power cannot be invoked to abrogate or impair it."
>
> 4. "The statutes of Ohio which create the Public Utilities Commission and define its powers do not confer authority on the Commission to change rates fixed by the terms of valid contracts made by a public utility with a municipality in the exercise of powers clearly conferred upon it."

In the opinion Judge Johnson quotes from Chief Justice White's opinion in the Cleveland case (194 U. S. 517)

at page 533 to show that street railway contracts in Ohio were binding, and further quotes from the **Walla Walla case,** 172 U. S. 1, and the Vicksburg case, 206 U. S. 496, to prove that contracts of this class are proprietary in their nature, and being innocuous cannot be abrogated or impaired by the subsequent exercise of the police power. Part of his opinion, beginning with the last sentence from his quotation from the Walla Walla case is as follows:

> "'But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.'
>
> "And in **Vicksburg vs. Vicksburg Water Co. 206 U. S. 496,** it was held that a state may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves, from the right of regulation of such matters as water rights. At page 508 of the opinion it is said: 'That a state may in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt.'"

In the very recent case of **Knoxville Gas Co. vs. City of Knoxville,** 253 Fed. 217, in which the company sought to escape from the binding effect of the rate provisions of its franchise, the court refers to a similar contention of the plaintiff as follows:

> "In other words, the contract made by the authority of the ordinance is unilateral and hence voidable by either party. This contention I think is made and reputed in **Omaha City vs. Omaha,** 147 Fed. 1, 77 C. C. A. 267, where it is pointed out that municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office; the other business or proprietary, in

> the exercise of which they are governed by rules as individuals or private corporations. The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions."

The Omaha case defines the proprietary class of powers, as distinguished from the governmental, as the means by which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. So here in relation to our street railway franchises, the city is interested in getting adequate street car service over a definite period of years at the lowest rate possible in return for the grant of the right to a certain exclusive use of the streets, and this is distinctly done for the individual advantage of the citizens and of the city itself.

Opposing counsel refer to these franchises as legislative grants and cite cases in which they are incidentally so referred to, seeking to leave the impression that such franchises are held to be an action of the city in its governmental capacity rather than in its proprietary capacity If this is for the purpose of showing that the contract is an unilateral one, as suggested in the Knoxville case, we need only refer to the Interurban Railway & Terminal case, 98 O. S. 287, above cited, in which it is not only held that neither party to the contract can abrogate it, but also that the Public Utilities Commission of Ohio has no such power and cannot be vested by the Legislature with such power.

This is also the holding of the Supreme Court in the case of the **City of Cincinnati vs. Public Utilities Commission of Ohio,** 98 O. S. 320, decided June 21, 1918, in which it was decided that a gas franchise, in which a rate was fixed for ten years and the means provided of

thereafter determining the rate during the remaining fifteen years of the franchise, was not effected by the subsequent creation of the Public Utilities Commission and the vesting in such Commission of the power to pass upon the reasonableness of all municipal rate ordinances. The most pertinent parts of the syllabus are as follows:

> 7. "The provisions of Section 614-44 G. C. were not intended to, and do not apply to a contract made prior to the passage of that section and which, by its terms, does not expire for more than one year.
>
> 8. A contract, such as above described, which is passed in full compliance with authority expressly conferred, is protected by the provisions of Section 10, Article 1 of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts."

If complainants contend that these franchises are legislative acts for the purpose of showing an act of the city depriving it of "due process of law", then our reply is that they have no contract or other right of which they are deprived by these franchise contracts; that they are not denied of "due process of law" by their enforcement, and are estopped to deny the validity of their own contracts under which they have received and enjoyed valuable rights. But this question is treated under other headings. Suffice it is to say that they cannot point to a single case in which the enforcement of one's franchise agreement was held to deprive him of "due process of law."

THE FRANCHISE CONTRACTS ARE NOT PERMISSIVE MERELY, BUT IMPOSE SPECIFIC DUTIES UPON THE GRANTEES, THEIR SUCCESSORS AND ASSIGNS, DURING THE ENTIRE TERM OF TWENTY-FIVE YEARS

We emphasize this premise because appellants admit that, if this proposition is true, their attempted surrender of August 20, 1918, is ineffective and they must continue to operate in accordance with the provisions of the franchise. (Pages 17, 19 and 20).

We will discuss the cases bearing upon the abandonment of its public duty by a public utility in a later section of this brief, but at this time we desire only to call attention to the very clear provisions of the ordinance. In not a single street railway case in the country, or in any case relating to any public utility, have the courts annulled a franchise under the conditions existing in this case, when the duties imposed upon the utility were as clear and specific as they are under these very comprehensive ordinances.

In considering these franchises the court should bear in mind the broad delegation of power to Ohio cities under statutes, which clearly evince the legislative intent to place in the hands of cities full power to bargain for street railway service at the lowest rates and under terms most favorable to the public in consideration for the grant of proprietary rights in the streets.

Appellants quote from the opinion in the case of Delaware & Hudson Canal Co. vs. Coal Company, 8 Wall, 276 to the following effect:

> "Undoubtedly necessary implication is as much a part of an instrument as if that which was so plainly implied was expressed."

In these cases it is not necessary to resort to this rule of necessary implication, as the Company's duties are expressly stated. In the street railway cases cited by appellants, the existence of a schedule of minimum operation, without any express reference to the entire term of the contract, has always been conceded to impose a duty which the Company cannot abandon. The court will notice in the following sections quoted that not only are minimum schedules specified, but it is provided that full and adequate service shall be given during the entire term of the franchise. (P. 17-20 Record, No. 715.)

Blanket Franchise (Ordinance No. 17801.)

"Section 17. Said Company shall, as rapidly as the requirements of its railroad system and the efficient service of the public demands, **during the life of this grant,** expend not less than $1,000,000 in extensions and betterments, and **shall, at all times during the life of this franchise, furnish upon all its lines efficient and adequate service and a sufficient number of first-class, commodious cars for the accommodation of its patrons.**"

"Section 21. Said The Columbus Railway Company, its successors and assigns, shall be entitled to charge fares within the corporate limits of said city **during the term herein** provided at the following rates, **and no more,** to wit:" (Here follows several paragraphs in relation to rates of fare and transfers.)

"Section 22. Between the hours of 5:30 A. M. and 12 o'clock midnight cars **shall be run** at intervals not to exceed the following, viz: High Street, between north and south corporation lines, 10 minutes; Schiller Street and High Street, to north corporation line, 10 minutes; Long Street, 6 minutes; Main Street and Neil Avenue, 6 minutes; State and Oak Streets, 7 minutes; Livingston Avenue and Fourth Street, 10 minutes; Leonard Avenue and Camp Chase, 11 minutes; Mt. Vernon Avenue and Cemetery, 11 minutes; Central Market line, 15 minutes; Pennsylvania and Parsons Avenue, 10 minutes; be-

tween the hours of 12 o'clock midnight and 5:30 o'clock a. m. cars shall be run, starting at 1 o'clock a. m. and continuing until 5 o'clock a. m. hourly upon High Street, West Broad Street and on two lines to be hereafter designated by said city, running easterly from High Street."

"Section 23. **Upon the expiration of the term** of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, wires and other appliances from the streets and avenues of said city and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues."

Central Market Franchise. (Ordinance No. 17802.)

(P. 27-29 of Record.)

"Section 14. Cars **shall be run** by said grantee, and its assigns, at no longer intervals than fifteen minutes, unless prevented by unavoidable casualty, and shall be operated regularly between 8 a. m. and 10 p. m. on Sundays, and between 5:30 a. m. and 11:30 p. m. on all other days; and said grantee and its assigns shall not run a train of more than three cars, including the motor, on any of its lines in said city."

"Section 18. As a consideration for the grants herein made, the said The Central Market Street Railway Company, and its assigns, shall pay to the City of Columbus the following per cent. upon the gross receipts of said company for local passengers' fares received within said City of Columbus, to wit: Two per cent. of said fares **during the term of said franchise.**"

"Section 19. This grant is made **and shall continue in force for the full period of twenty-five (25) years** from and after the twenty-third day of April, 1900, and all franchises and grants to said grantee and its assigns for extension of lines, turnouts, switches, connections or additional lines of street railway connected with, or to be connected with the lines of street railway of said grantee and its as-

signs, authorized and permitted under this ordinance, shall be considered a part of the system of railway hereby authorized, and shall expire and wholly terminate with the expiration of the franchise and grant authorized under the terms of this ordinance."

"Section 21. **Upon the expiration of the term** of twenty-five (25) years, provided by this ordinance, unless such grant has been renewed or extended by said city, the City of Columbus shall have the right by giving two years' notice, in writing, before the expiration of said term of twenty-five years, of its intention so to do, to purchase of the said grantee and its assigns."

From these sections and from the other sections of the franchises it is apparent that the parties agreed upon a scheme of street railway operation to take care of the service needed by the City of Columbus for the entire term of twenty-five years. It is absurd to argue in view of these complete provisions that the parties intended the grantees to have the right to abandon service at any time desired. The result of such abandonment, namely, the loss of street railway service, the tearing up of the city's streets, and the other chaotic conditions existing in cities where franchises have expired, were the very conditions which the city would be most anxious to avoid.

Certainly these duties, which are just as binding upon the Company as if imposed directly by the state, must be performed by the grantees during the entire term of the contract.

THESE DULY ACCEPTED FRANCHISES ARE BINDING UPON BOTH PARTIES DURING THEIR ENTIRE TERM OF TWENTY-FIVE YEARS.

At page 25 of their brief appellants admit that "the franchise grants were contracts controlling rates of fare so long as they continued in existence". While accepting their admission, it is nevertheless necessary in a general way to review the decisions, pointing out the exact nature of the contract relation, in order that in the next subdivision of this brief we may show why the company cannot destroy these franchises by a mere stroke of the pen.

In an earlier subdivision we pointed out that the statutes of Ohio delegated to cities full and complete power to contract for street railway service for definite terms not to exceed twenty-five years, and definitely imposed upon such cities the duty for the benefit of the public to incorporate in such contracts, as the consideration for the property rights granted, as low a rate of fare as the grantee would accept. Opposing counsel incidentally referred to the fact that Section 2501 provides that the original contract shall "prescribe the terms and conditions" upon which the road shall be constructed, while a renewal is to be made "upon such conditions as may be considered conducive to the public interests". That the Legislature intended to draw no distinction in the use of these terms is settled beyond doubt by the succeeding sections, which are uniform as to original grants and renewal grants, providing equally that no grantee shall be released from any obligation or liability of either the original grant or renewal; that in the case of an ordinance

granting the right to extend an existing street railroad, the rate of fare shall not be increased; and that in case of consolidations no increase of fare shall be allowed. These references prohibiting the increase in fare apply alike to the extension of lines covered by original and renewal grants, and if the Legislature had not intended the rate of fare to be a condition of the renewal grant, this provision would serve no purpose. But it is unnecessary to discuss this further, as the identical sections were considered by this Court in the case of renewal grants by the City of Cleveland in the Cleveland case, (194 U. S., 517). It is to be noted that the statutes required a definite term to be fixed and forbade either an original grant or renewal grant for the construction and operation of a street railway in any city for a longer period than twenty-five years.

We have already discussed these statutes and cases bearing upon the proposition to show that this delegation of power was exercised by the city in its proprietary capacity, as business agent acting for the private benefit of its citizens and itself, and that the contract resulting from the exercise of such power was not a governmental act, but like an ordinary contract and protected from impairment by the United States Constitution.

As pointed out in the statement of facts, the bill alleges that the grantees duly accepted these franchises, granted to them, their successors and assigns, and that such acceptance as required by the ordinances was "the filing by the said The Columbus Railway Company with the city clerk of said city, of its acceptance in writing of each and all the terms, provisions and requirements of this ordinance," and in the second ordinance "the filing

with the city clerk of said city by said company of a written acceptance of its terms and conditions".

Certainly there is no formality lacking in the execution of these contracts. The rate of fare was an essential term and condition of the contracts, made so by the express command of the Legislature. The life of the contract was also an essential term and condition of the contracts, made so by a like command. By its acceptance of the terms, conditions and requirements of the franchise ordinances, the grantees accepted the rates of fare therein provided and the life of the franchises as therein stated. They also specifically agreed to give full and adequate street car service during the entire life of the franchises.

The Blanket franchise ordinance itself was held by the Circuit Court of Ohio, in the case brought in 1902 on the relation of the prosecuting attorney, to be a contract, the conclusion being reached in these words:

> "We have already seen that the statutes such as those under consideration delegate the power to a city to bind itself by contract and not merely power to license."
>
> **State ex rel. v. Columbus Railway Co.**, 1 O. C. C. (N. S.), 145, 160.

In the opinion of Judge Westenhaver the nature of this contract relation was the primary and controlling question in the whole case, and was conclusively settled to his mind by the decision of this court in the case of **Cleveland v. Cleveland City Railway Co.**, 194 U. S., 517. As Judge Westenhaver gave this case very careful consideration, and wrote a very able opinion, we take the liberty of quoting at some length his conclusions on the question of the contract relationship, as follows:

> "**The primary and controlling question**, in my opinion, depends on the nature of the relation cre-

ated between the complainant and the city by these franchise grants. This relation is settled beyond controversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States. The statute law of Ohio in force when these ordinances were passed were sections 2501, 2502, 2505, 2505b, 3443, 3443-12, Bates Annotated Statutes of Ohio. They are copied in full in the margin, 194 U. S., 531-34. These sections, slightly different only in phraseology, are now sections 3768 to 3777 and 9101 to 9139 of the Ohio General Code. Cases construing these sections and defining the rights and burdens created by franchise ordinances, such as are now under consideration, are the following: Railway Company v. Village of Carthage, 36 O. S., 631, 634; City of Columbus v. Street Railroad Company, 45 O. S., 98; Interurban Company v. Cincinnati, 93 O. S., 109; Cleveland v. Cleveland City Railway Company, 194 U. S., 517; Cleveland v. Cleveland Electric Railway Company, 201 U. S., 529; Cleveland Electric Railway Company v. Cleveland, 204 U. S., 116.

The holding of all these cases is uniform. Of them the leading one is Cleveland v. Cleveland City Railway Company, 194 U. S., 517. **The law as settled** by these cases is that the legislature has by these sections delegated to municipal corporations full power and authority to enter into binding contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding twenty-five years, and for a fixed rate of fare to continue during the term of such grants may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term with a rate of fare to endure during that term, and this ordinance is accepted expressly or impliedly, a contract is engendered mutually binding and unalterable, except by the consent of both parties, during the term thereof.

In **Cleveland v. Cleveland City Railway Company**, 194 U. S., 517, all these rules are fully stated and upheld. The question there was whether or not the ordinances under consideration had in fact created a

contract at a fixed rate of fare for a definite term, thereby extinguishing a right reserved to the city in earlier ordinances of increasing or diminishing the rate of fare."

(Then follows a quotation from page 536 of the opinion of Mr. Justice White:)

'The other cases are equally in point, and, inasmuch as no conflict exists therein, a review of them is unnecessary. Numerous cases illustrating and applying the same rule are contained in the United States Supreme Court Reports arising under municipal ordinances of other states. A citation of them is for the same reasons superflous.'

We cannot emphasize too strongly the **Cleveland** case, because it is an exact parallel of the two cases at bar. The decisions of the case required the court to construe the very statutes which the court is called upon to construe and pass upon in these cases. In that case the original franchise ordinances were succeeded by renewal, extension and consolidation ordinances, all fixing rates of fare. Subsequent to the passing of the last franchise ordinance, the city passed a rate ordinance under a power reserved in the original ordinance, but not reserved in the later ordinances. The court held that the later franchise ordinances were contracts in every sense of the word, and bound the parties for the entire period of twenty-five years, during which stipulated time "obligations were imposed upon the corporations to continue those benefits". We quote several pertinent observations from the opinion of Mr. Justice, now Chief Justice White, (page 534):

"The question for decision, then, is, Did the consolidation ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to

the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?

That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. * * * But let us consider the question without treating the Ohio decision as conclusive. * * * That in exercising its powers it was the intention of the city to avail of the authority conferred by section 3443 of the Revised Statutes of Ohio, 'to fix the terms and conditions upon which street railroads may be constructed, operated, extended and consolidated', and that it was also the intention of the city to execute binding agreements in respect to the rates of fare to be thereafter charged by the railroad companies, will, we think, become clearly apparent by considering the language employed in the ordinances. Thus, in the ordinance of February 16, 1885, fixing the terms and conditions upon which the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the tracks of those companies, might be consolidated, it was specifically provided 'that for a single fare from any point to any point on the line or branches of the consolidated road, no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or 22 for $1.00 shall at all times be kept for sale on the cars by conductors'. The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing and filed with the city. Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying of the additional track and the extension of the lines of the Woodland Avenue and the West Side Street Railroad Company, * * *. The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language.

In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits

were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged. Taking all of the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens Street R. Co., 184 U. S., 368, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S., 437."

It is to be noted that even the provisions of the ordinances are identical as to the method of acceptance, as to rates of fare and the requirement that tickets be kept for sale. (See Section 21 of the Blanket franchise, page 19 of the record).

In reply to the contention of counsel that these franchises are merely permissive, we wish to put special emphasis on the conclusion of Chief Justice White, that these ordinances for definite terms imposed the obligation upon the corporation to continue the benefits of the service provided by the franchises during the stipulated time. In this connection we wish also to call attention to the granting clause of the Blanket franchise as follows:

"The Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues, and parts of streets and avenues, aforesaid, for said period of twenty-five years, from and after the passage of this ordinance, upon and subject to each and every of the terms, conditions, stipulations and requirements hereinafter prescribed, and

subject to the requirements of the general ordinances of the City of Columbus, Ohio." Record, p. 13.

If it was not the intention of the parties to assume mutual and binding obligations during the entire period, why was it necessary to make any mention of twenty-five years? The statutes in force at the time limited all street railway grants to a maximum period of twenty-five years, and without any mention of that period the grantee would have had a right to exercise the privileges conferred during that period, but would not have been under the same binding obligation to continue. But as we have pointed out in an earlier section of this brief, the provisions of these ordinances are most complete and provide not only a minimum schedule of operation, but also that the company "**shall, at all times during the life of this franchise, furnish upon all its lines efficient and adequate service and a sufficient number of first-class, commodious cars for the accommodation of its patrons**". (Section 17 of the Blanket franchise.)

Certainly these franchises clearly evince the intention upon the part of the parties to provide a complete scheme of street railway service during the entire life of the franchise, and to give any other effect would be to do violence not only to the apparent intention, but to the express terms of the instruments. The decision in the Cleveland case alone is sufficient to submarine the first four contentions of opposite counsel in these causes, but the decision of this court in **Detroit v. Citizens Street Railway Co.**, 184 U. S., 368, and the decision in the case of **Knoxville Water Co. v. Knoxville**, 189 U. S., 437, both of which this court followed in the Cleveland case, finish the destruction of their contentions.

In the Detroit case, as in the Cleveland case, the suit

was to enjoin the enforcement of certain ordinances, which reduced the rates of fare on various city railways fixed by former franchise ordinances, the city claiming that the franchise ordinances did not constitute binding contracts as to rates of fare. The Michigan statutes, as pointed out by Chief Justice White in the Cleveland case, are very similar in the power conferred upon cities and many of the observations of Mr. Justice Peckham in the Detroit case are directly applicable to this case. We quote as follows:

(Page 385):

> "It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the legislature. It was made a matter of agreement by the express command of the legislature. Ordinances of a like nature were passed by the common council relating to the other companies, and all of them were accepted in writing, and they all had in them provisions relating to, or referred to ordinances providing for, the rate of fare in language similar to the foregoing.
>
> Coming to a consideration of the effect of the language used, we think it amounted to a contract as to rates of fare."

Then the opinion quoted this from another case which had been previously decided by this court: **(City R. Co. v. Citizens Street R. Co.**, 166 U. S., 557):

> " 'The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the state

was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose.'

Although in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject-matter which could not be altered during its continuance by either party."

The parallelism between this cited case and the causes at this bar now is so obvious that it is unnecessary to consume much time on it. This court expressly said and decided in the cited case that the Legislature of Michigan authorized the city "to make a contract or agreement like the ordinance in question, including rates of fare." So here, for the same reasons, the Legislature of Ohio authorized the City of Columbus to make the contracts and agreements constituted by the passage of the ordinances and their acceptances, and they include the rates of fare.

This court decided, in the cited case, that "among the most material and important of the terms and conditions which might be imposed by the city" was the rate of fare; that the rate of fare naturally and legitimately "would be a subject for grave consideration and conference between the parties"; and "when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement." All of this can be equally predicated of the transaction between the City of Columbus and the grantees in the two ordinances. This court further said in the cited

case that the rate of fare "was made matter of agreement by the express command of the Legislature." And in City Railway Co. v. Citizens' Street Railway Co., 166 U. S., 557, this court declared that the ordinance of the council of Indianapolis "was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition when accepted by the company and the road built and operated as specified became a contract." This is equally true of the ordinances now under consideration in this court.

Opposing counsel's repeated insistence that these franchise contracts are legislative enactments because the rate-making power is governmental, is futile. Under the decisions above cited Columbus acted in its proprietary capacity in making a franchise contract, and fixing therein as one of the considerations for the grant certain agreed rates. Such a case is entirely different from the exercise of the governmental power of rate-making, which is, as its name indicates, an arbitrary legislative act of the sovereign without the consent of the one whose property is affected. Such action is governmental in its nature, but that power may be suspended by a contract and the contracting parties are protected under the contract impairment clause of the United States Constitution. Regardless of where the governmental power is vested, it cannot be exercised during the continuance of these franchise contracts against the grantees thereunder.

When opposing counsel say that these franchise contracts do not bind the state, they entirely overlook two very recent decisions of the Supreme Court of Ohio. The

City of Cincinnati v. Public Utilities Commission of Ohio, decided June 21, 1918, (98 O. S., 320), and the **Interurban Railway & Terminal Co. v. Public Utilities Commission of Ohio,** decided June 21, 1918, (98 O. S., 287), Ohio Law Reporter of December 9, 1918, page 447. In the latter case a street railway franchise was in question, and as the case is quoted from at some length in an earlier portion of this brief, (page —), it is unnecessary to again state the facts. From this opinion there can be no doubt as to the opinion of the Ohio Supreme Court as to this contention of opposing counsel. The court said this of Ohio street railway contracts:

> Syllabus 3. "A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the constitution, and the police power cannot be invoked to abrogate or impair it.
>
> Syllabus 4. The statutes of Ohio which create the Public Utilities Commission and define its powers do not confer authority on the commission to change rates fixed by the terms of valid contracts made by a public utility with a municipality in the exercise of powers clearly conferred upon it."

The opinion also sets forth the facts and conclusions of the court in the case of **Quinby et al. v. Public Service Commission,** decided April 5, 1918, by the Court of Appeals of New York, 119 N. E., 433, in which a similar conclusion was reached.

To the same effect was the decision by the Supreme Court of Ohio in the first case cited **(Cincinnati v. Public Utilities Commission),** in which it was held that a provision in a gas franchise, fixing a rate for a limited period and providing a method for subsequent determinations during the life of the franchise, was binding upon the parties; and that, inasmuch as Ohio statutes gave the

city power to enter into such a contract, statutes subsequently passed conferring appellate jurisdiction upon the Public Utilities Commission over gas rates, should be construed not to apply to a contract made prior to the passage of the later law; and that such a contract "is protected by the provisions of Section 10, Article I of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts."

With the Ohio situation so clearly defined by these decisions of this court and of the State Supreme Court, it would avail nothing to discuss the entirely different questions presented by the laws of California and Wisconsin, as analyzed by the State Supreme Courts and approved by this Court.

We come now to a consideration of the cases, pertaining to the duty of a street railroad company to furnish service during the entire term of a contract, when for a definite term.

In beginning this discussion we can do no better than quote the convincing words of Judge Westenhaver, beginning at the top of page 82 of the record, a few paragraphs removed from the termination of the last quotation from his opinion:

> "No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of twenty-five years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises; that this contract requires the owner during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other.

> The impairment-of-contract and the due-process-of-law clauses of the Constitution have often been invoked to prevent cities from impairing franchise grants, or forcing a reduction in the contract rate, and the courts have uniformly, despite all criticism, sustained and upheld them and, in so doing, have vindicated the law.
>
> It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee therein, and not the city which is seeking to change the terms thereof without the consent of the other party. It is of primary importance that contracts should be upheld by the courts, for the right to contract and the binding obligation of contracts once made lie at the foundation of all public and municipal law."
>
> "This proposition is really the controlling of all questions argued, but a brief consideration of other questions presented should perhaps also be made."

Opposing counsel appear to take a great deal of consolation from the language in the Interurban cases (93 O. S., 108; 98 O. S., 447) and the Columbus Street Railway case (45 O. S., 98), in which cases the court, in holding that the companies could not escape from the obligations of their franchise contracts, used the language "as long as it enjoys this franchise." The question of whether the company could escape by surrendering the franchise or tearing up its contracts was not before the court, nor in any way in issue. Those franchises were not for a definite period, and as far as the record shows there was no provision in any of the franchises from which the obligation to operate for a specific period could be implied. The language was used simply to guard against too broad a statement of the rule.

The only decision in Ohio, on the question of whether or not a franchise for a definite period with a schedule of operation, is permissive only or binding during the

full term, is the case of **Fort Loramie vs. C. P. Gress,** which was decided by the Ohio Court of Appeals, Fourth Circuit, on the ninth day of July, 1918, (not yet reported). Later the Supreme Court overruled a motion to require the Court of Appeals to certify the record of this case, so that this decision stands as the final authority in Ohio. The suit was for an injunction against the First National Bank of Bremen, Ohio, and the Western Ohio Railway Company, to prevent them from ceasing operation of the Loramie and Minster Railroad. The cross-petition of the bank asked that it be permitted to dismantle and junk the railroad property on the ground that it would be unprofitable and confiscatory to continue operation.

As recited in Judge Allread's opinion, concurred in by the other two judges, the franchise ordinance granted to the company, its successors and assigns, "a franchise to construct and operate for twenty-five years an electric street railway in West Main street of that village, and by Section 10 of the ordinance the grantees were required to furnish service from Fort Loramie to Minster." In that section no direct reference is made to the term of the franchise, but it is provided that the owners "shall maintain thereon passenger cars * * *, and such cars shall be run at least as often as the Western Ohio Electric Company, * * * shall be run at such times as to make direct and immediate connection with all regular passenger cars leaving said village of Minster," etc. The relevant part of the opinion is as follows:

> "The question as to the obligation of a public service corporation to continue service under a franchise for a definite period of time with mandatory provisions for operation has not been determined by

our Supreme Court in any case which has come to the notice of the court.

Many decisions are cited upon the charter obligation of the public service company to continue the service, but we think the question as to the duty of the Minster and Fort Loramie Company to continue service under its state charter is not the controlling question. We are of the opinion that this case must be decided under the franchise ordinance and the obligations created thereby. We are of the opinion that when the Minster and Fort Loramie Company accepted the franchise ordinance of the Village of Fort Loramie, occupied Main street in said village and began the operation of the railway the ordinance became a contract. **Gas Co. vs. Akron,** 81 O. S., 33; **Interurban Co. vs. Cincinnati,** 93 O. S., 108; **Interurban Co. vs. Public Utilities Commission,** 98 O. S.

It is clear that the ordinance contract was binding upon the village. The village could not after acceptance revoke the right of the company to occupy its streets. If the contract was binding upon the village the reciprocal covenants of the ordinance which are presumed to form the consideration of the contract were also binding upon the railway company. A franchise ordinance might be drawn so as to give the public service corporations merely a right without fixing any definite obligations to continue service, but this ordinance goes farther and charges upon the public service corporation and its assigns certain mandatory duties as to the continuance of the service. When the Minster and Fort Loramie Company, therefore, accepted the benefit of the ordinance it was bound by the duties therein imposed.

It is claimed, that to compel a company to operate a franchise at a loss is confiscatory and contrary to the guarantee of the Federal and State Constitutions. We think, however, that the constitutional provisions in this respect do not apply to contract relations. The 'out of pocket' argument may properly be invoked in a case where obligations are sought to be charged against a company solely by legislative act or executive order. But where a

party enters into a contract the fact that the contract may prove to be a losing one is no defense to its enforcement."

In this opinion Judge Allread, in his usual able manner, stated the principle which has been recognized in every street railway service case in the country. In every municipal street railway case, brought by a city to enforce service and prevent abandonment of a street railway, the court has always recognized the rule that, if the franchise contains mandatory provisions for the operation of cars at certain intervals, and if the term of the franchise is definite, then there can be no abandonment.

There has been a decided difference of opinion where the franchise was for an indeterminate period and was in the form only that permission be and the same is hereby given to operate a street railway on certain streets.

As illustrating this claim let me refer to the leading case of opposing counsel: **(San Antonio Street Railway Company vs. State,** 90 Texas, 520). In the syllabus and opinion the court emphasized the fact that the franchise was merely permissive in form, and that there was no requirement whatever of operation at any time or on any schedule. This judge, in reviewing the case of **City of Potwin Place vs. Topeka R. R. Company,** 51 Kansas, 609, showed very clearly what his opinion would be as to the effect of the very strong provisions of the ordinance involved in our case, by pointing out that the milder provision in the Potwin Place ordinance was sufficient to impose a duty upon the company to operate. The language of the court in commenting upon that case was as follows (page 526):

"The ordinance upon which the company acted, however, contained a requirement that the 'said railway shall be so operated that a car shall pass any given point each way on the route at least every twenty minutes for twelve hours, and at least once every thirty minutes for four hours, during that part of the day the road shall be operated.' **These are the words of command, and may be construed as making it the duty of the company, in case it should construct and operate its road, to continue to operate every part of its line. The opinion, we think, might have been safely placed upon this requirement.** But whether such was or was not the intention of the court, we cannot say from the opinion."

In the circumstances of this case, the plaintiff cannot cite a single street railway case in support of thier contentions. By "the circumstances of this case" we mean the very complete provisions of the statutes of Ohio, which clearly grant to the cities complete control over street railways, and clearly show the legislative desire that public obligations be imposed upon the street railroad for a definite term; also and with special emphasis, the very complete and comprehensive scheme of street railway service outlined in these franchise ordinances, including very specific obligations as to the minimum operation schedules, quality of service, care of tracks and equipment, rates of fare and guarantee of expenditure of $1,000,000 in the improvement and maintenance of the system, etc., etc.

In the case of **State ex rel. vs. Bridgeton & M. T. Company,** 62 N. J. L., 592, 45 L. R. A., 837, the street railroad company incorporated under the laws of the state, and the route of its road and location of its tracks established by an ordinance of the municipality and accepted by the company, constructed its tracks in accord-

ance with said ordinance, and afterwards attempted to abandon part of its line, located beyond a certain bridge, because it could not agree with the bridge supervisors as to the manner of operation thereover. The court held that such a company:

> "cannot, at its mere will and discretion, cease and abandon the operation of its line or any portion thereof. It becomes the duty of the railway company in the exercise of its rights, privileges and franchises, for the benefit of the public, to maintain and operate its road according to the terms of the ordinance and in compliance with statutes which confer upon the company such rights, privileges and franchises. (1st branch of Syllabus.)
>
> 2. An implied condition attaches itself to the grant of the franchise, that it be held for public benefit; and the duty upon the railroad company is to exercise it for such purposes; and, as a public agent it cannot escape this duty."

The court held that mandamus was the proper remedy to compel the performance of the duty, and that such duty was imperative until surrendered "by the legally expressed consent of the state."

In the case of State ex rel. v. Spokane Street Ry. Co., 19 Wash., 518, 41 L. R. A., 515, the street railway company had received a general grant of power from the state, and had proceeded to construct and operate a line outside of the municipality with the consent of the property owners, and after the section was annexed to the city, continued to do so without any interference by the city or county. It was held that the company had a public duty which it could not abandon without the consent of the granting power.

In the case of Loader v. Brooklyn Heights Railroad Co., 35 N. Y. Supp., 996, a writ of mandamus was sustained to require a railroad company to operate its cars,

the cessation of operation having been occasioned by the inability of the street railway to get its employes to accept its terms of employment. In this case there is an excellent discussion by Judge Gaynor of the duties of a street railroad company to the public, in which he points out that such a company is:

> "in its chief aspect a public corporation, having obligations to perform to the public, which transcend the obligations which in its private aspect it owes to its stockholders.
>
> * * * They (the directors) are not merely accountable to stockholders. They are accountable to the public first and to their stockholders second. They have duties to the public to perform and they must perform them."

In the case of **Loader v. Atlantic Avenue R. R. Co.**, 35 N. Y. Supp., 999, a similar writ was allowed by Judge Gaynor under somewhat similar circumstances.

In the case of the **City of Potwin Place v. Topeka R. R. Co.**, 51 Kansas, 669, the company had received from the municipality the right to construct a street railroad on certain streets under an ordinance requiring street car service to be furnished by the compnay. The original grantee deeded to the defendant company its franchise, which the defendant accepted and operated under for a time and then attempted to abandon service. A writ of mandamus was allowed. A very clear and strong statement of the duties of such a company is contained in the opinion of the case.

In the case of **Paige v. Schenectady Railroad Company**, 178 N. Y., 102, the facts were somewhat different, but the principle that a street railroad cannot abandon its line after construction without the consent of the state, is very clearly stated. The facts in the case were that the original grantee, after constructing the road,

went into the hands of a receiver. The receiver proceeded to tear up and junk part of the line and sell the balance to an individual, who proceeded to relay the tracks on the abandoned portion. An injunction was brought to prevent this reconstruction, but the court held that the original abandonment was illegal and ineffective because the necessary consent of the state had not been secured; and therefore it was not only the purchaser's right, but his duty to reconstruct the line and operate the road.

In the case of **Thompson et al. v. Schenectady R. R. Co.** (C. C. A.), 131 Fed. Rep., 577, the court expressed very strongly the same view of the duties and obligations of such a corporation. The court in part said:

> "The right to construct and operate a street railway is a franchise granted by the state upon consideration of the public welfare; and any contract which disables the corporation from performing its functions without the consent of the state, and made to relieve the corporation of a burden which it had assumed, is void as against public policy."

In every one of these cases, except the Loader cases decided by Judge Gaynor, the railroad company attempted to abandon all or part of its line for the reason that the same was unprofitable, but the argument of the court in each case shows very clearly that the right of the public is superior to that of the stockholder or bondholder, who invests in the road knowing the contract that has been made with the public for the use of public property.

The case of **New York Trust Co. v. Portsmouth & E. Street Ry. Co.** 192 Fed., 738, was cited in the court below by opposing counsel, but we desire to call the court's attention to the recognition by the court of the superior

right of the public to demand the continued operation of the road. In that case the road had been operated at a serious loss from the beginning; there was no way to operate without continued loss and it was in bad condition and dangerous to operate. This case was in the Federal Court on the ground of diversity of citizenship, and the court decided the only practical solution was to first offer the railroad as a going concern, in order that every opportunity might be given to continue to fulfill the public duty.

Of the three street railroad cases, in which abandonment of the road was permitted by the court, counsel for the plaintiff ventured in the court below cite one only, the Montana case (**Montana ex rel. v. Helena Power & Light Co.**, 44 L. R. A. 692). Although the court in this case quoted from the opinion in the San Antonio case very copiously, opposing counsel for the very good reasons of their own failed to call attention to the San Antonio case, or the case of **Stiles v. Citizens Electric R. R. Co.**, 199 Mass., 394, because, as we believe, the opinions in these two cases point out very clearly and emphasize the difference between the cases where a mere license has been granted, and those cases in which the franchise clearly imposed duties upon the utility companies.

In the Montana case the court emphasized the fact that the ordinance granting the franchise, provided that the right was:

> "Subject to forfeiture for failure to operate it and there is no expressed provision requiring the maintenance or operation of the line." (Syllabus).

And the court further said in the opinion:

> "The ordinances of the city are barren of language expressing or implying the intention of the council to impose such duty (to continue operation). On the contrary, they merely grant the right and privi-

lege of constructing, operating and maintaining railways in particular streets."

In the San Antonio case, 90 Texas, 520, the court emphasized the fact that a mere privilege or license was granted to the company and that no duty to operate was imposed either expressly or by fair implication from the terms of the statute, or otherwise. As stated before, the relevant point of the opinion is contained in the comment on the Potwin Place case.

It has been very interesting to read the other cases cited by opposing counsel upon this point (see pages 35 to 38 of their brief), as it was then apparent how hard pressed they were to find anything in support of their contention.

The case of **Savannah Canal Company v. Shuman,** 91 Ga., 400, involves a canal system which had been permitted to run down, and which the owning corporation declined to operate. Private individuals applied for writ of mandamus, and notwithstanding the defense in the answer to the effect that the company had no funds or any means to obtain same, and if said canal were put in navigable condition it would not be profitable to operate it, the Supreme Court sustained the granting of the writ compelling operation, and observed: "So long as the corporation retains its franchise, the unprofitableness of the same is immaterial; and although want of means may follow as a reason for not inflicting punishment for disobeyance of the writ, it offers no conclusive reason for not ordering the writ to issue."

This case involved a mere permissive charter not for a definite period or term, and not containing any definite provisions as to the operation. So the consolation the

plaintiff takes in the first line of the above quotation is not of interest to this court.

In quoting from the case of **Fellowes v. Los Angeles,** 151 Cal., 52 (page 36 of their brief), they are certainly guilty of a lack of frankness to this court, to say the least. They quote language from page 64 of the opinion to the effect that, "we do not mean to say that a corporation engaged in the distribution of water for public use may not abandon its property" * * *. In the sentence immediately following this quotation the court proceeds to say that it expresses no opinion on the right of abandonment. We quote the sentences immediately following their quotation, which are as follows:

> "In case of a natural person it might become physically impossible. We do not intend to declare that in such case mandatory process could be issued to compel a personal performance of the duty. **These questions are not involved and we express no opinion concerning them.** But in such case, it cannot continue in absolute control of the water-works appropriated to the public service."

We cannot see how there can be any comparison between appellant's contractual obligations in this case and the Los Angeles case, because that was an action to compel the city itself to furnish water from the water system which it had taken over from its former owners, and the court held that it must either continue the public service or return the property to such owners in order that they might render the service.

On page 37 they quote from the opinion in the case of **Northern Pacific v. Washington,** 142 U. S., 492, and permit us to quote the preceding paragraph of the opinion by Mr. Justice Gray:

> "If, as in **Union Pacific R. R. Co. v. Hall,** 91 U. S., 343, the charter of a railroad corporation ex-

pressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in State v. Hartford & N. H. R. Co., 29 Conn., 534), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with the express requirements of statute. **N. O. M. & T. R. Co. v. Miss., 112 U. S., 12; People v. Boston & A. R. Co., 70 N. Y., 569.**

OPERATION AT A LOSS OR POSSIBLE OR PROBABLE BANKRUPTCY DOES NOT RELIEVE THIS PUBLIC UTILITY FROM THE PERFORMANCE OF THESE FRANCHISE CONTRACTS, NOR WARRANT THIS COURT IN PROTECTING THE COMPANY IN THE VIOLATION OF THE CONTRACTS.

In commenting upon the Northern Pacific Railway case, (142 U. S., 492), opposing counsel at page 38 of their brief draw the conclusion that, if the grant is permissive only, then the abandonment of a part of the railroad may be sustained if the operation is carried on at a loss. Therefore permit us to point out in the beginning of this argument that the first complete answer is that these franchise contracts are not permissive grants, but impose specific and definite duties based upon the grant of valuable proprietary interests in the public streets as a consideration. The fact that a valuable consideration was given to the company, not merely a charter with the power to condemn, but the actual gift of valuable property rights, is the second important distinction between this company's case and the cases cited by it.

But first a statement of the alleged financial situation is important, so that we may compare it with the situations presented in the other cases. As stated in the opening statement, allegations in the first bill, eliminated from the second bill after the oral argument in the first case before Judge Westenhaver, justify the conclusion that the company was making a good return on its alleged valuation of $12,000,000 in 1916 in addition to its "proper charge for depreciation". The increase in the coal and labor bills alone in 1917 over 1916 added to the net income for the year 1917-18 after deducting a "proper charge for depreciation," was $537,129.00. This represents 4½% on the principal, without taking into account the difference in other bills and the "proper charge for depreciation," which was either used for dividends or placed aside for future use, in which case it is now available to meet the deficiencies for this lean year. Certainly even this partial showing for the year 1916 when the world war had affected prices considerably, gives some idea of the profits of the fat years.

As to the alleged situation for the year ending June 30, 1918, and for the current year ending June 30, 1919, permit me to review part of the opening statement.

In the first bill it is alleged that the mortgages against the Street Railway part of the company's property amount to $7,295,000 with annual interest charges of $333,000, and in the second bill the amount of bonds so apportioned against the street railway property is $8,600,000 and the annual interest charge $460,000. It is alleged that for the year ending June 30, 1918, the net income, after deducting operating costs, taxes, and a "proper charge for depreciation" is $301,987.00. This was insufficient to pay the interest on the mortgage bonds

by $31,000 under the allegations of the first bill, and by approximately $100,000 under the allegations of the second bill. It is not stated what deduction was made for depreciation, but we may safely assume that their estimate was 5% on the alleged value of the property ($12,000,000), or $600,000. Such depreciation is theoretically a sinking fund for future replacement purposes, so even if we concede that mortgage bonds, issued on the first day of April, 1915 (see paragraph 11 of the second bill) have priority over the claim of the public based on the underlying franchise grants of 1901, there would be a balance of $500,000 in the operating revenues for the year ending June 30, 1918, to stave off the alleged dangers of insolvency. For the year ending June 30, 1919, it anticipated that the operating revenues will be insufficient by $250,000 to meet the operating expenses, taxes and a "proper charge for depreciation." This "proper charge for depreciation," estimated above at $600,000, is more than sufficient to meet the deficiency of $250,000 and the interest charge of $333,000 as stated in the first bill, and is only $50,000 short of enough to pay the interest charge as stated in the second bill. This is not a bad showing for the lean year of the twenty-five year contract, and it emphasizes the elasticity of the "short time" within which bankruptcy is predicted.

By these allegations they virtually claim that the necessity for laying aside a sum for depreciation and of paying the interest on bonds, with which they have encumbered property in various processes of manipulation, is superior to the terms and consideration upon which they hold their entire property right in the streets, and upon which the mortgages are based. It is like saying that a mortgage given in 1915 is superior to a purchase

money mortgage given in 1901, or that a mortgage on a leasehold interest must be paid by the lessee out of the rental due to the lessor. The public's rights are greater than any of these because the company in entering into the franchise contract assumed a duty to the public, which it cannot escape, except through the process followed by every debtor, unable to meet his obligations.

The allegation is that operation at these rates will result in bankruptcy **in a short time.** What do the plaintiffs mean by a short time? It has now outlasted the war and bids fair to outlast war prices. Certainly these claims are not sufficient even to appeal to a chancellor in a suit for specific performance. With these comments upon their allegations as facts we turn now to a discussion of the law pertaining to this subdivision.

Another very important consideration, bearing upon this plea of impossibility of performance because of the possible bankruptcy of the company, is the fact that the company is admittedly doing a very large and extensive power and light business, and the bill is entirely devoid of any allegations showing the amount of profits in such business and their insufficiency to offset the alleged deficits in the railway business. The only possible issue in this case is not that of determining a proper rate for railway service, but is such that the company must show that its entire financial situation is hopeless.

The first answer to the company's contention is that such a claim has no relevancy in this suit. This point Judge Westenhaver emphasizes on page 83 of the record in the following words:

> "These statements, it will be noted, apply only to the street railway part of complainant's business. **Furthermore, this is not an application by the city for a mandamus or a mandatory injunction to compel**

continued operation under present conditions nor a suit to compel specific performance of a harsh and unconscionable bargain. Complainant here is seeking an injunction to protect it in a manifest and plain violation of its contract. The rules of law under which courts have refused to compel the operation of an unprofitable railway branch or an unconscionable contract have no pertinency."

This statement of Judge Westenhaver finds support in the opinion of Mr. Justice Strong of this court in **Marble Co. v. Ripley**, 77 U. S., 10, Wall., 339, 19 L. Ed., 955, 960:

"Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated. If it be, indeed, unequal now, and if it has become unconscionable, that might possibly be a reason why a court should refuse to decree specific performance; but it has nothing to do with the question why it should be ordered to be cancelled. **It is not the province of a court of equity to undo a bargain because it is hard.**"

The second answer is very aptly stated in Judge Westenhaver's opinion (p. 83):

"On the other hand, if the operation of a railway line cannot be continued owing to insolvency, a court will not, by mandamus or otherwise, try to compel its further operation, and this is particularly true if its continued operation will perform no useful public service. **This refusal of the courts to interfere does not proceed on the view that the company had a right to abandon the operation of an unprofitable system, or of an unprofitable branch. If there is a statutory or contract duty to maintain and operate this obligation still remains in law just as a debtor's obligation to pay his debts remains after he has become insolvent.** But a court will not attempt to compel by mandamus or otherwise that which is manifestly futile and impossible, for a court has no means of providing capital to operate an insolvent railway company or to continue its operation after it has be-

come insolvent. This, it seems to me is all that can be claimed for the statement found in some cases that a court will not compel a continued operation at a loss of a railway line or branch."

Since the company has no right to abandon operation, it has nothing upon which it can base a suit in law or in equity against the City. The company owes this obligation to the City and to the public which it represents and its only appeal can be to the discretion of the chancellor before whom the City applies for the issuance of a mandatory writ. The courts hold that such a chancellor has a discretion in the issuance of such a writ and can refuse the same when to do so would be futile. But in this case the appellants have suffered no legal wrong, for which they are entitled to a remedy. The maxim volenti non fit injuria applies alike to the company and to these appellants claiming under it.

The opinion of Judge Chatfield of the U. S. District Court, Eastern District of New York, in the case of **Gas & Electric Securities Co. vs. Manhattan & Queens Traction Corporation,** involving the petition of the receivers for permission to charge an increase in fare and to increase wages of employes, states the situation in this case exactly. The opinion was handed down on September 9th, 1918, but is not yet reported. The pertinent parts of this opinion are as follows:

> "But if they can disavow the obligation or temporarily postpone operation under it, the court would then have property in its hands which can be operated only within the law. Possession of the property gives the court the right to enjoin any attempt to interfere with that possession or to restrain any illegal exercise of authority. But this court cannot prevent the City from enforcing in a proper tribunal the rights which the receivers are

standing upon as the basis for having anything to receive.

"The receivers cannot treat the right to operate a road as property in their possession, and then ignore or disregard the essential limitations showing of what the property consists. In other words, the receivers have a property right to hold and operate a five cent fare collecting business, with its physical accessories and implements. But the plant cannot be put to another use without the making of a new contract. This court has not the power to force such a new contract on the City, nor to regulate fares upward beyond the limits fixed by the contract creating the right to act at all. The court has not the power to fix the rate at which the City must allow the road to be operated. Simpson et al. v. Shepard, 230 U. S. 352 at 433. Nor can the court proceed to exercise the franchise while holding it unconstitutional.

"There is no vested right to operate a road for public convenience, unless that right be the one which the contract establishes. The court may prevent a breach of contract by the city in reducing rates; it may hold a statute unconstitutional as confiscatory, if a proceeding is brought under Section 266 of the Judicial Code as amended; but it cannot abrogate a contract by holding unconstitutional the law under which the contract was made, and thereupon enlarging the terms of the contract, in order to avoid the consequences of ceasing to act under the contract.

"Nor should the court order its receivers to treat the public unequally by allowing them to collect an excess fare from those passengers who do not refuse to pay.

"The remedy must be sought by application to the City or to the Public Service Commission for a modification of the franchise, if the receivers deem it to the interest of the creditors to continue the franchise rather than to liquidate. The rights and convenience of the public must be looked out for by the receivers and the City from the standpoint of the consequences if the receivers stop operating. But the end will not justify the means so as to give

the court jurisdiction to prevent the proper authority from deciding what franchise the public should grant for its own welfare.

"The application must be denied but without thereby preventing or hindering the receivers from seeking any source of relief from the terms of the franchise itself."

There is no escape for the plaintiffs from the logic of these two decisions. As pointed out by both Judge Westenhaver and Judge Chatfield, if Company's situation does become critical without action by the City the only escape for the company is by a receivership and then it will be for the trustee or receiver to ascertain the real facts, and sell the property, or apply to the city for relief in a more frank and sincere manner than this company has heretofore done.

In the case of **Fort Loramie vs. Gress et al.**, (not yet reported) hereinbefore cited, decided by the Ohio Court of Appeals of this district, the First National Bank of New Bremen set forth in its answer and cross-petition a much stronger state of facts in relation to the unprofitable nature of the street railroad business involved, than is set forth in the bill in this case, and in its cross-petition sought an order of the court to permit it to discontinue operation and junk the road. Among the facts were that the road had never been a paying concern, had never produced enough revenue to pay operating expenses and depreciation; that the road had twice been in the hands of receivers because of insolvency, and there was not any reasonable prospect that it ever could pay any return on its value.

We have already stated the facts in this case, showing a provision in the franchises requiring operation of cars at intervals, and have quoted Judge Allread's opinion

holding that the franchise engagements were the material point in the case. As to the claim that forced operation at a loss was confiscatory and in violation of the Fourteenth Amendment, he said:

> "It is claimed, that to compel a company to operate a franchise at a loss is confiscatory and contrary to the guarantee of the Federal and State Constitution. We think, however, that the constitutional provisions in this respect do not apply to contract relations. The 'out of pocket' argument may properly be invoked in a case where obligations are sought to be charged against a company by legislative act or executive order. But where a party enters into a contract the fact that the contract may prove to be a losing one is no defense to its enforcement."

But in this case the company is not seeking to junk the road by removing its tracks, but, as Mr. Clark very aptly expressed it in the lower court in referring to another case, is seeking to "eat its cake and have it, too."

In the case of **Interurban Railway & Terminal Co. et al. vs. City of Cincinnati**, 93 O. S., 108, the court necessarily passed upon the refusal of the Court of Appeals to permit the filing of an amended answer, setting forth the insolvency of the company and the appointment of a receiver, because of the enforcement of the franchise rate of fare. The facts as to such pleading are recited at the bottom of pages 113 and 114. At pages 123 and 124 of the opinion the court emphasized the fact that it cannot relieve the company from a hard bargain and that the allegations of such facts are not a sufficient defense:

> "It is insisted that the enforcement of the terms of the franchise under inquiry here will work hardship and irreparable injury to the company; and cases are cited in support of the accepted proposition that neither the state nor any of its agencies

can, by regulation or legislation, withhold from the owners of the railroad just compensation for its services. But in this case we are dealing with the subject of contract. It implies a meeting of minds. It is much to be regretted if the amount which the interurban company is required to pay to the Cincinnati Company for the use of its tracks is too large a proportion of the fares received, and it is equally to be regretted if the fare provided by the contract itself does not furnish a compensatory return to the company. The presumption is that it was to the interest of the village and to every municipality to provide such a compensation for the services to be rendered by the public utility as will induce the investment of the capital necessary to the furnishing of the service. In fact, it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation. It is equally the duty of the company not to contract to perform a service for less compensation than is proper.

But we are not able to see how the court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof. The judgment will be affirmed."

It should be noted that the words "as long as the company continues to operate under the franchise" is accounted for by the fact that the franchise was granted for an indeterminate period, and that no specific duty was imposed as to the manner of operation for any definite period. At the time of this decision the opinion of the Supreme Court in the Northern Ohio Traction case had not been handed down, and under the doctrine of the Akron case, 81 O. S., the Supreme Court of Ohio was of the opinion that a franchise contract for an indeterminate period was revocable at the option of either party.

In the only suits in which this question can be raised, namely, a suit begun for the specific performance of a franchise contract, or for a writ of mandamus, the courts have not refused the writ **where a specific duty to operate existed under charter provisions or under a grant of property rights**, merely because the operation was at a loss.

The only instances in which the writ was refused were where some unusual circumstances were present, such as in the case of **Jack vs. Williams, 113 Fed., 823.** In that case the court pointed out that there was no public demand for the road; that the road had been sold by a receiver and junked; and that the parties who purchased from the receiver had no right to construct or operate a railroad under the laws of North Carolina.

The distinguishing feature of these cases are very clearly pointed out in the very comprehensive opinion of the judge in the case of **Southern Railroad Company vs. Hatchett**, 174 Ky., 43, L. R. A. 1917-D, page 1105, cited with approval by Judge Westenhaver. The discussion and analysis of the cases is thorough and we ask the court's careful consideration. The court's summaries are announced in the following paragraphs:

Page 1109:

> "While some of the cases relied upon by the appellant do, in general terms, announce the doctrine that no railroad corporation will be compelled to operate its trains at a loss, a careful reading of the cases upon the subject will show that the modern general rule is that a company cannot legally abandon its road or a branch, **even though it may be operated at a loss**; and those cases which are apparently in conflict with this rule will be found to have turned upon special circumstances that warrant the decision.

And on page 1112 the following:

> "It of course follows that if a company cannot change the location of its road without the consent of the state, it cannot abandon it. The only seeming exception to the rule (and it is really no exception) is in the case of a bankrupt road, **where there is no one to operate it.**"

And also on page 1111:

> "And here it may be noted that the courts make a distinction in cases of this character and frequently will enjoin the abandonment of a road when they will not, by mandamus, compel a railroad company to relay, rebuild and operate a part of its road which had theretofore been abandoned."

It is unnecessary to analyze appellant's cases in further detail, because in not a single case was the relief of specific performance or mandamus refused when there was a clear charter or franchise duty imposed, as in this case. We refer to the following cases, in which able judges have outlined and enforced the duties of public utilities to the public, and have held that loss in operation, until the time had been reached when there was no one against whom the order could be enforced, was no excuse for non-performance.

Southern Railroad Co. vs. Franklin & P. R. Co., 96 Virginia, 693; 44 L. R. A. 297;
Farmers Loan & T. Co. vs. Henning, Fed. Cases No. 4666;
Talcott vs. Pine Grove Twp., Fed. Cases No. 13735;
Gates vs. Boston & N. Y. Air Line R. Co., 53 Conn. 333, 5 Atl. 695;
Colorado & S. R. Co. vs. State R. Commission, 54 Colo. 64, 129 Pac. 505;
State ex rel. Naylor vs. Dodge City M. & T. Co., 53 Kas., 377, 42 Am. St. Rep. 295;
State vs. Sioux City & P. R. Co., 7 Neb. 357;

Attorney General vs. West Wisconsin R. Co., 36 Wis. 466;
Brownell vs. Old Colony R. Co., 164 Mass. 29, 29 L. R. A. 169;
People vs. Albany & V. R. Co. 24 N. Y. 261.
People ex rel. vs. St. Louis A. & T. H. R. Co., Ill. Sup. Ct., 35 L. R. A. 656.

NEITHER THE PRESENT HIGH COST OF OPERATION, AN ECONOMIC RESULT OF THE WAR, NOR THE WAGE ARBITRATION BY THE NATIONAL WAR LABOR BOARD, TERMINATES THESE CONTRACTS, NOR ENABLES THE COMPANY TO DO SO.

The affirmative of this proposition is stated by opposing counsel in the following words (p. 48):

> "The situation presented by the war was not within the expectation or contemplation of the parties when the contracts were made, and that as this situation has been created by the war, which is a vis major, the company is justified in claiming that the contracts were not intended to be binding in any such event."

But the most favorable rule they can deduce from any of their cases is that the court, reviewing all the circumstances of the case, must find that no reasonable man would have made such a contract if such a contingency had been contemplated. (See their brief, page 64.)

The solution on the basis of such a rule depends upon the answer to two questions: 1. Was the contingency contemplated at the time of the making of these franfranchise contracts; 2, and, if not, would the companies have accepted the grants if the contingencies had been contemplated?

At the time of the making of these contracts in 1901,

America had entered the field of world politics. The war with Spain began in 1898, and in that year we sent our ships and our men across the Pacific Ocean to invade foreign lands. In the harbor of Manilla we even had a brush with the Germans. All wars of the past had produced a very material effect upon prices. This is a matter of such common knowledge that the court will take notice. Prices were very high during the Civil War, and there is some dispute whether on a percentage basis the increase over pre-existing prices was not as great as during this war. Certainly American conditions were much more disturbed by the Civil War.

In 1901 the idea of a brotherhood or league of nations was not in contemplation, and in fact wars were much more in prospect in those years than they appeared to be in 1914. Certainly when the state legislature authorized, and the parties agreed upon a twenty-five year term, they had in mind the absolute and unconditional settlement of the street car problem in Columbus for that length of time. The agreement is unconditional and each party to the contract took its chances. The great question, as Judge Hollister points out, for the company to decide was as to the cost of operation. The costs of wages and materials with the possibilities of increase, had to be **averaged** over a twenty-five-year period. In 1901 there was certainly no reason to believe that these costs would decrease; in fact, Judge Hollister notes that they were then showing great possibilities.

Can this court say that the average of these costs over the whole twenty-five-year period have so exceeded the expectation of the parties that no reasonable man would have accepted these contract grants in the year 1901? Yet that is the appellant's proposition. This is not like

a contract for a short period, which was entered into immediately before the war and which would be much more directly effected by war conditions.

Here, as far as the record shows, the grantees have made handsome profits in the years gone by, and undoubtedly have profited very materially by the great increase in the population of Columbus, amounting to 43% from 1900 to 1910 and at least 30% since 1910.

One thing is absolutely certain, and that is that the grantees would not have received their franchises from the city, if any mental reservation of this sort had been publicly known. As the preamble to the Blanket franchise recites, the price of that grant was to have all the lines, owned or formerly owned by the grantee, operated for a definite period under uniform terms. The city and the company desired to escape the chaos resulting from operation of separate lines under varying franchise terms and to settle the question of the franchises that had expired and were expiring in order to avoid such conditions as have existed in Cleveland and Detroit. No money was required of the company for the use of the streets, and it is apparent the real consideration was the rate of fare, upon the ascertainment of which the interest of all was centered.

If under these circumstances these franchise contracts can be terminated at the option of the company, then there is not a street railway franchise in the country that is worth the paper on which it is written, and every company will then be able to go ahead with its operation free of any restraint whatever, except that that lies in the police power. Not only the rate provisions, but every other provision of these franchises would thereby be cancelled. This court has certainly had enough experience

with street railway problems in cities, where franchises have expired, to know the problems in store for cities in such an event.

Judge Hollister approached the consideration of this question with a doubt in his mind in the company's favor, and he made every allowance in favor of their claim in testing their every case. His conclusions, beginning at the bottom of page 57 of the record, are therefore doubly interesting, as follows:

> "But the circumstances here present a different case. In the preparation for the bidding there were a number of prime factors the company had in mind in determining the rate at which it was willing to carry each passenger. That was based on a number of considerations: The then population of Columbus; the rate of increase in the city's population, as shown by the census, and perhaps by interim statistics; and the cost of operation, including salaries, supplies, and especially wages. The great item of cost of each would be wages, seldom subject to diminution, and having in it even at that time potentialities of tremendous increase. What labor in this country would be demanding during twenty-five years was one of the most important questions to be debated by the promoters of complainant's predecessors .
>
> "On the figure to be paid in wages each year depended the great question of dividends, without at least the hope of which the franchises would not have been sought. Unexpected conditions in the labor market growing out of a war of such character as to have been beyond the anticipation of any one, have thrown the carefully considered plan, which involved revenues greater than cost, out of adjustment; have reversed the contemplated ratio of revenue to cost, and have defeated the plan.
>
> "While the parties did not anticipate the happening of this war, yet the contractor might well have anticipated such rising wages possible during twenty-five years from whatsoever cause, as might wreck the plan and precipitate bankruptcy. As in

the law he would be required to guard himself against the consequences of non-fulfillment by reason of strikes, so here the contractor could have guarded itself against an increase in the cost of labor so great as to prevent his doing what he agreed to do. Contracts for future performance often contain a clause excusing the contractor from performance made impossible by future happenings over which he has no control.

"Of course, the grantee here intended, expected and contracted to operate under the franchise for twenty-five years at the contract rate. Since to do this it was necessary that wages should be always at a figure which made performance possible, it was necessary, in my judgment, for the grantee of these franchises to have guarded against a situation which might happen, namely, the failure of revenue to meet expenses through circumstances unanticipated and over which the grantee had no control.

"This brings into application what was also said by Mr. Justice Matthews in Railway v. Hoyt, 149 U. S., 1, 14, 15:

" 'There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the fault or default of the promisor.'

"If this conclusion is sound, and I think it presents the better argument in the debate, then the doubt must be, and it is, so far as this court is concerned, reserved in favor of the defendants."

In the very recent case of **Knoxville Gas Co. v. Knoxville,** 253 Fed. Reporter, 217, identical allegations were made in the petition to enjoin the city from enforcing a gas rate, which had been fixed in the franchise under which the company operated in Knoxville, and which rate the company claimed had become unremunerative

because of war prices. The court refused the relief sought. The pertinent part of the opinion is as follows: (Page 220.)

"That conditions have radically changed within the last year must be admitted. The war with Germany has brought about a great scarcity of labor on the one hand, and largely increased its cost on the other. The cost of all material entering into the making and distributing of gas has also greatly advanced.

"Under such circumstances, has a court of equity power to relieve a gas company from a contract it voluntarily and understandingly made, and permit it to make another more to its liking, upon the ground that subsequent events have so changed conditions that the contract made by the plaintiff is no longer remunerative? In Blake v. Pine Mountain Iron & Coal Co., 76 Fed., 624, 22 C. C. A., 430, the Circuit Court of Apppeals of the 6th Circuit said:

"It is just these hardships which a court of equity cannot relieve by rescinding contracts, or making new ones by construction, through the process of balancing for non-performance, and going into parol proof of other or different conditions than those expressed in the contracts themselves, intentions relative to failures not anticipated at the time the contracts were made, or not provided for by the terms of the agreements, as they would have been if the parties had not been improvident in neglecting such protection as was open to them against possible failure and change of conditions. The reasonableness of a contract, its fairness and justice, are to be determined as of the time when the parties entered into it, and so of the intentions involved in the construction of their agreements; **and none of these are to be influenced by the force of subsequent changes in events or circumstances.**

"The Blake Case was cited and followed by the Circuit Court of Appeals for the 6th Circuit in Ruggles v. Buckley, 158 Fed., 950, 86 C. C. A., 154. So it would seem to follow that, unless plaintiff can bring itself without that general rule, a court of equity has no power to relieve it, notwithstanding, under

> the new conditions that have arisen, the contract has become a hardship on the plaintiff, and it cannot be performed without loss."

Most of the cases cited by opposing counsel have been considered by Judges Westenhaver (p. 84) and Hollister (p. 57), and as both judges have pointed out their inapplicability to the present case, it seems unnecessary to take up much time in discussing them.

The North German Lloyd v. Guaranty Trust Co., 244 U. S., 12, and Steamship Styria v. Morgan, 186 U. S., page 1, both involve the direct intervention of a war danger and the masters of the particular ships were called upon to exercise, as bailees, the proper degree of care for the safety of their cargoes, as well as of the lives entrusted to their care. Certainly the facts have no relevancy to our case.

The cases of Krell v. Henry, (1903, 2 K. B., 740), and Brenner v. Consumers Metal Co. (41 Ont. L. R., 534), are alike. In the former case throughout the negotiations of the parties the fact was emphasized that the use of the room was desired to view the coronation parade. The advertisement in the window of the lessor's building, which first attracted the lessee's attention, stated the fact that the rooms were to let for the parade only. The opinion shows that parol evidence was admitted for the purpose of identifying the subject matter.

The same is true of Brenner v. Consumers' Metal Co. The contract for the delivery of shrapnel was based upon the correspondence between the parties, and in his letters the manufacturer emphasized the fact that he could make deliveries only as fast as he could secure cars for shipment. The court held that a conditional contract was thus made, and "that it was an implied term of the

contract that unless shipping facilities should be available within a reasonable time the obligation of the company to deliver would be at an end."

In relation to the case of Tampa Steamship Company, Appeal Cases 1916, Vol. 2, 397, opposing counsel quote from the opinion of one of the dissenting judges. We wish to call attention to the fact that the majority of the court held that the charter party of the vessel for five years was not terminated by the requisition of the vessel by the admiralty, and the charterers could still claim the vessel and the compensation. In several other cases, notably Liston v. Owners of Steamship Carpathian, the question of seamen's contracts was involved. Great additional hazards to life and liberty had arisen because of the dangers from German war vessels and submarines, and the court following the general humanitarian rule held the contract terminated by this **direct intervention** of war. If the court had held this contract terminated, because of the increased cost of living, there might have been some similarity.

Judge Westenhaver's conclusions after reviewing these decisions were as follows: (Page 84 of the opinion.)

> "No such conditions are herepresent. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, have made the performance of them only more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree perhaps affected the performance of many, if not the larger part of outstanding and unexecuted contracts between citizens of the United States, yet it would be a strong proposition to say that all such contracts are thereby rendered void or voidable at the option of the losing party.

"The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies and labor, it would not be urged upon any one that the city would have the right to declare null and void these contracts or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position it would be met, and justly, with a complaint that such action is impairing the obligation of a valid and binding contract.

"In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance would bring the case within the operation of these rules."

Great stress is placed on the award of the War Labor Board increasing the wages of the employees of the appellant company. But the bills disclose that the employees of the appellant company inaugurated a strike for higher wages; it was agreed between the appellant company and its employees that it should be submitted to the arbitration of the War Labor Board. There was no legal compulsion on the appellant company to submit it to arbitration.

It is the duty of every public utility to pay a living wage, and it is also the duty of the company to man its cars whether or not it can agree with the men on the amount of wages or not. The company cannot stand on its own idea of wages and refuse to give service as Judge Gaynor pointed out in the case of **Loader v. Brooklyn Heights R. R. Co.**, 35 N. Y. Supp., 996, and **Loader v.**

Atlantic Avenue R. R. Co., 35 N. Y. Supp., 999. The essential thing is that the company must give service and must pay whatever wages are necessary to get the men to man its cars. That is the exact situation here. The company could not agree with its men, and the matter was therefore referred for arbitration by the voluntary action of the parties. The finding of the War Labor Board was just as binding upon the company as any other arbitration would have been, and no more so.

President Wilson, by proclamation, defined the powers and functions of the War Labor Board. First, he said: (From the bulletin published by National War Labor Board.)

> "And I do hereby urge upon all employers and employees within the United States the necessity of utilizing the means and methods thus provided for the adjustment of all industrial disputes, and request that during the pendency of mediation or arbitration through the said means and methods, there shall be no discontinuance of industrial operations which would result in curtailment of the production of war necessities."

This makes it manifest that the board had no power to compel either employers or employees to arbitrate.

Next, the functions of the board are, by the proclamation more specifically defined thus:

> "To bring about a settlement, by mediation and conciliation, of every controversy arising between employers and workers in the field of production necessary for the effective conduct of the war."

This makes it plain that the board could not increase the wages of the employees, unless employers and employees had submitted their controversy to the arbitrament of the board.

Of course, after the parties had so submitted their dis-

pute and the board had made an award, the award was compulsory, just as it would have been, but no more so, if they had submitted the dispute to John Smith and John Jones as arbitrators.

The bills of the appellants show, expressly, that the appellant company and its employees voluntarily submitted their disputed questions to the board.

But this is not all. The bills utterly fail to show that the fulfillment of these contracts will be rendered impossible by the company by any act of public authority. The European War did not do this.

War between two nations never affects the contracts between citizens of one of the belligerents. It only suspends the enforcement of contracts between parties who are citizens of both belligerents. As soon as the war ends, they can be enforced.

There is still more to be said. By paragraph (C) of the Act of Congress of June 15, 1917 (Advance Sheets of Federal Reporter, May 23, 1918, page 119), the President is empowered "to take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation." Before Judge Westenhaver, this was cited by opposite counsel but why we did not learn. Whenever the President chooses to exert the power there conferred, he may change the rates of fare. That is, he could do that if he should take control of all street railroads. Manifestly, he would not exercise the power in the instance of the street railroad of one city.

This seems to be the view of ex-President Taft, one of the Chairmen of the War Labor Board, who said:

> "I think it is very doubtful whether the President has, under the law, the right to alter or regulate the affairs of street railways within the states. Counsel

before us claimed that the legislation now existing was sufficient, but on a closer examination, I am inclined to think that, while undoubtedly he might take over the street railways of the country and run them as necessary to war work and war production, and taking them over he might fix the rates of fare to the public as he would choose, I don't think that the right to fix fares or increase them is included within the right to take over public utilities and then charge such rates as he may approve to the public."

He added that Congress could, in the exercise of its war power, endow the President with power to increase the fares on street railways in particular cases, and that he had advised the President to ask Congress for further legislation of that character; but the latter never asked for it.

We respectfully submit that Judge Westenhaver stated the law exactly as it is when he said:

> "In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance would bring the case within the operation of these rules."

NO SURRENDER NOR ABROGATION OF THESE CONTRACTS HAS BEEN EFFECTED.

Our first contention under this heading is that there can be no surrender or cancellation of these franchise contracts **without the consent of the city,** by reason of the propositions already well established, we believe, in the preceding sections of this brief, namely, that the contracts were valid and binding when made and, not

being permissive in form but imposing specific duties of operation upon the grantee during the entire term, are binding upon both parties for the twenty-five year period. The company's letter of surrender, therefore, accomplished nothing.

Our second proposition is, assuming for the purpose of the argument that the franchises are permissive and could be terminated at the will of the grantees, with or without cause or because of an implied condition, that there has been no surrender or abrogation of the franchises effected by the action of the Company on August 20, 1918, or thereafter.

We base this contention on two grounds:

(1) The consents of the mortgage trustees, who represent large investments based on the franchise rights, have not been secured, nor have said trustees been made parties to this suit, or otherwise notified of the procedure of the appellant company; and

(2) The verbal destruction of the franchises is ineffective to relieve the appellants from the obligations thereof, for they still continue to enjoy the privileges received at the time of the acceptance of these grants by continuing operation and maintaining their structures in the streets.

The petition in the second case shows that the Girard Trust Company, residence and place of incorporation not stated, is the trustee in the first mortgage on the properties of this company, and that the appellants in the second case own $200,000.00 of the bond protected by that mortgage. The bill in the first case shows that the mortgage bonds against the street railroad property alone in the hands of bona fide holders amount to $7,295,000, and in the second case these figures are in-

creased to $8,600,000. The Girard Trust Company is only referred to in the second petition, and was not made a party, nor was any consent received from it, or notice given to it in relation to the procedure adopted by the appellant company in notifying the city council of Columbus that on August 20 it surrendered its franchises. Other mortgagees, or mortgage trustees, are not even referred to in either of the bills.

This presents an unusual situation indeed. It is a matter of very common knowledge that a very large percentage of any street railway company's investment is in the streets, consisting of tracks, or track substructure, and the paving which the companies are generally required to lay between the tracks. It is to be noted, too, that the blanket franchise (Sec. 23, page 21 of Record No. 715), provides:

> "Sec. 23. Upon the expiration of the term of the renewal franchise herein granted said company shall, unless a further renewal be granted by said city, remove all its tracks, rails, and other appliances from the streets and avenues of said city, and leave the portion of each and every street occupied by its lines in good condition, corresponding in finish and material with the remainder of such streets and avenues."

Can it be that the appellant company can by a mere letter, without any consent or waiver from the mortgagees, destroy absolutely every dollar of value represented by the amounts of the various mortgages? There is no doubt but the value of the rails and poles, after their removal from the streets, would be less than the cost of replacing the streets in good condition, corresponding in finish and material with the remainder. Our contention is that the mortgages cannot be acrificed in that manner.

We base this contention upon the case of **The Old Colony Trust Co. v. City of Omaha**, 230 U. S., p. 100, 57 L. Ed., 1410. In this case the city had denied the validity of a claimed franchise for the distribution of electric current for heating and power as well as for lighting. The light company was unsuccessful in maintaining its claim, but the Old Colony Trust Company, the trustee in the mortgage on the lighting company's property, was not made a party in that case, and subsequently filed a suit. The following portions of the syllabus and of the opinion state very clearly this court's opinion of the rights of such a trustee, as follows:

Syllabus:

> "4. A decree against the electric light and power company in a controversy with the municipality over its franchise does not prevent the trustee in the mortgage given by said company from maintaining a similar suit against the municipality, where the trustee's rights and those of the bondholders whom it represents were acquired long prior to the first suit, and the trustee was not a party to that suit."

Opinion, page 122:

> "In other words, the trust company is entitled to insist upon a recognition and continuation, subject to all the qualifications inhering in the franchise, of all the rights conferred by the franchise ordinance as the same was interpreted in actual practice by the electric company and the city prior to the resolution of 1908. But neither the trust company nor the electric company is entitled to make that construction a basis for enlarging or extending those rights, against the will of the city, or for enlarging or extending the purposes for which electric current may, through the use of the streets, be transmitted and supplied under the protection of the franchise.
>
> A prior suit by the electric company against the city, largely but not entirely like the present, re-

sulted in a decree against the electric company. The city now takes the position that that decree is conclusive upon the trust company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit, but long prior thereto and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. **Keokuk & W. R. Co. v. Missouri**, 152 U. S., 301, 313; 38 L. ed., 450, 455; **Louisville Trust Co. v. Cincinnati**, 22 C. C. A., 334, 76 Fed., 296."

The principles thus clearly enunciated leave no room for doubt. The company's invitation to the city to put it off the streets, amounts to nothing. It is mere bluff, intended merely to give it the opportunity to hold the people of Columbus by the throat, while it dragged out of their pockets a 65% increase in single rides, and a 95% increasee in double or transfer rides. The company deserves the censure of this court for seeking Federal aid in its nefarious proceeding.

In addition to the fact that there has been no notice to or consent by the trustee, it is to be noted, also, that the company has continued the operation of all the franchise lines. It may be possible that failure to operate would effectively bind the mortgagee, but certainly when the company continues the operation of its cars and lines for public service, the fact that it demands a greater fare will not work a forfeiture as against the mortgage trustee. The city has, or is supposed to have, its remedy in the state courts for such a violation of the contract.

For **our second proposition** upon the argumentative assumption that the franchise is permissive, is that the verbal or written announcement that the franchise has

been surrendered to council does not effect that result without a complete withdrawal of the property from its dedication to the franchise use. When a franchise is granted by a city, accepted by a public utility company, and the streets of the city and the property of the company together dedicated to a public use, a public institution has been created.

When the franchise is for a definite period, that period marks the time that the owner is required to continue the dedication of his property to the public use. He can then discontinue the dedication, but as long as he continues to enjoy the benefit of such a grant, namely, the use of valuable property rights in the streets, he cannot deny the binding effect of the instrument which created and is an inseparable part of his rights and privileges.

It has been established by the opinion of this court in the case of Detroit Union Railway Co. vs. City of Detroit, that at the expiration of a franchise for a definite period a street railway company

> "has no implied contract right to remain in the streets under such reasonable arrangements for public service as the situation may require, which would be impaired, contrary to the U. S. Constitution, Article 1, Section 10;" nor is its property "taken without due process of law by requiring it to remove its tracks and other property from the streets within a reasonable time." (2nd and 3rd branches of the syllabus.)

Under the terms of Section 23 of the Blanket Franchise, above quoted, the company is required upon the expiration of the term of the franchise and "to remove all its tracks, rails and other appliances from the streets and avenues of said city," and to replace the streets in

good condition, **"unless a further renewal be granted by said city."**

If the appellants claim under this provision the burden falls upon the appellants in this case to show cause for the continuance of their tracks in the streets, and they can only do this by showing that council agreed to give them a new franchise. But the whole burden of their complaint is that the city insists upon the old franchise and its terms. **The continuance of their tracks in the streets is entirely inconsistent with the surrender of the franchise, because of the provisions for removal above quoted.**

In the case of Mumm vs. Illinois, 94 U. S., 113, 126, Chief Justice Waite defined the effect upon private property of its dedication to public service and then said: (Page 126.)

> "He may withdraw his grant by discontinuing the use; **but so long as he maintains the use he must submit to the control."**

In this case the terms of the control are established by the contract of the parties, and until that contract expires, or until the dedication of the property is discontinued by the owner under the provisions of law, those terms must control.

The statement of this proposition is emphasized in the opinion of Judge Chatfield in the Manhattan & Queen's Traction Company case, quoted at length in a prior subdivision of this brief.

The appellant company is the lessee of certain streets of Columbus for street railway purposes. Its position is exactly analogous to any other lessee of property. Would the lessee of ground for a twenty-five year term, who had placed buildings thereon, be permitted to es-

cape judgment for the full amount of his agreed rental in the absence of any default on the part of the lessor, under the state of facts relied on by these appellants? All he would have to do would be to notify the lessor that, owing to the high prices resulting fro mthe war, the rent was too high to enable him to make a profit and the lease was therefore at an end, but that he would remain in possession and maintain his buildings upon the premises until he was removed by the lessor. Certain he could not escape judgment for the agreed rental during the time that he remained in position. The company is now in full possession and enjoyment of the streets of Columbus, and cannot escape judgment by any such subterfuge.

Do opposing counsel mean to say that the Interstate Consolidated Street Railway Company could have escaped the judgment of this court, as announced in 207 U. S., p. 79, by notifying the state that it surrendered its charter, but would continue to enjoy all the privileges of that charter? Surely counsel's plan would have been a very simple one for the Interurban Railway & Terminal Co., which endeavored in the courts of the state, and by application to the Utilities Commission, to continue the enjoyment of its franchise rights without paying the franchise consideration (93 O. S., 108; 98 O. S., 320). Surely counsel misconceive the nature of a franchise. We deny that the law is capable of such an absurdity.

DUE PROCESS OF LAW.

In the opposite brief, it is argued that the enforcement of the rates of fare which were agreed upon between the parties to these two ordinances would be a violation of the due process of law provision of the Fourteenth Amendment. Upon the admitted facts in these causes, that is a legal impossibility.

(1) There can be no violation of this constitutional guarantee, unless it is averred in the bill that the act violating it was committed by the state or some department or officer of the state. This is made clear by a decision of this court, wherein Justice Bradley said:

> "But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against **State laws** impairing the obligation of contracts.
>
> And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under such amendment, nor any **proceeding** under such legislation, can be called into activity; for the prohibitions of the amendent are against State laws and acts done under State authority."
>
> **Civil Rights Cases,** 109 U. S., 3, at 12 and 13.

(2) The state can only act by legislation; the city can only act by ordinance or resolution or motion.

(3) In the case at bar, such legislation, ordinance, resolution or motion would have to affect these contracts.

(4) They would have to deprive the company of some of its property without due process of law.

(5) But there is not a syllable of allegation in the bills that either the state legislature enacted a law, or that the city adopted or will adopt an ordinance, resolution or motion which affected these contracts or either of them. **The absence of such an averment is enough in itself to require the dismissal of this case.**

(6) The enforcement of the rates of fare by the city would not deprive the appellants or either of them of their property, because their predecessors in title, the companies to which the franchise grants were made, made contracts with the city which fixed the rates of fare. The statutes of Ohio which authorize or commanded these contracts to be made were decided by this court to be valid exercises of legislative power; the contracts were made in obedience to the authority and command of those statutes. Whatever is valid, whatever is done in obedience to law, is inherently due process of law. Due process of law is of its very essence. That to which a party to a contract consents does not lack due process of law. Any proceeding which the city should adopt to enforce these contracts would be in harmony with due process of law. It would be legally impossible to affirm that such a proceeding would lack due process of law.

If neither the legislature nor the city could lay its lawless hands upon these contracts, as this court decided in the Cleveland case, so has neither of the appellants any right to trample upon them with their lawless feet. The appellant company treated these contracts just as if they were mere "scraps of paper," just as the Kaiser treated the treaty with Belgium. This country sent

about two million soldiers over to France and Belgium, and they shed their blood there in order to shoot to death the immoral doctrine that justifies the violation of a contract treaty.

We affirm that no case can be found in which it was decided that the Fourteenth Amendment applied to a case where rates of fare were fixed by contracts by parties to the contract. Nor has any court ever decided that rates of fare fixed by the contract of parties violated the due process of law provision of the Fourteenth Amendment.

The bills here show affirmatively that neither the state nor the city has done anything to violate the contracts, and by positive averment, they show that the city is not intending to do any such act in the future.

In **Lowe v. Kansas**, 163 U. S., 81, 16 Sup. Ct. Rep., 1031, Justice Gray said the question for the court to decide was "whether this enactment, as applied by the Supreme Court of Kansas to this case, contravenes the Fourteenth Amendment of the Constitution of the United States, by depriving Lowe of his liberty or property without due process of law, or by denying him the equal protection of the laws." And then he added:

> "Whether the mode of proceedings prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases." (Page 1033.)

In the cases at bar, the contracts are not only in substantial accord with the law, they are in complete accord with it.

In Hurtado v. California, 110 U. S., 516, at 535, due

process of law in the Fourteenth Amendment was thus defined:

> "In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws; and alter them at their pleasure."

Justice Field defined this phrase in Dent v. West Virginia, 129 U. S., 114.

We also cite Bannon's Fourteenth Amendment, 142, 143, and Guthrie's Fourteenth Amendment, 70, on the question discussed.

We have already quoted at length from the opinion of the Supreme Court of Ohio in the case of the **Interurban Railway & Terminal Company v. Cincinnati,** 93 O. S., 108, **a proceeding by the City of Cincinnati** to enforce a franchise rate of five cents from what was formerly the Village of Pleasant Ridge to the terminal in Cincinnati. In order that the court may see the issue in that case as made by the company's answer, we quote from pages 112 and 113 of the opinion as follows:

> "Defendant says that said provision is unreasonable, that a fare of five cents from the corporation line of the village of Pleasant Ridge to the Cincinnati terminus, three cents of which the defendant is required to pay to The Cincinnati Traction Company, **will not be sufficient to produce an income to pay operating expenses of this defendant and will destroy its existence.**" (Pages 112, 113.)

In the Court of Appeals, the company asked leave to file an amendment to its answer,

"**alleging the ordinance was unfair, unreasonable**

and confiscatory; that the two cent net fare for the district involved did not produce sufficient income to pay the operating expense of the company, would destroy its existence and prevent it from operating any cars whatever on the line, and had already, since the execution of the decree of the common pleas court, been largely instrumental in forcing the company into the hands of receivers, who now have charge of the property. It was further alleged that the property was thereby confiscated and rendered valueless and taken without due process of law, contrary to the provisions of both federal and state constitutions.

The court of appeals refused leave to file this amended answer, and on the final hearing of the case found the issues in favor of the plaintiff and likewise entered a decree enjoining the defendants as prayed for in the petition."

By refusing to allow the amendment, the Court of Appeals decided that it did not constitute a defense, or, to be more concrete, that it was not a sufficient defense, that the rate of fare was confiscatory, that it would "destroy its existence", that the decision of the Common Pleas Court enjoining the company from increasing its fare above that fixed by the contract had forced the company into the hands of a receiver, and had rendered its property valueless and had confiscated it, and taken it without due process of law. And the Supreme Court affirmed that determination of the Court of Appeals.

As stated before, the appellants' entire **right** of action is based on the due process clause of the Fourteenth Amendment. They seem to think there is some magic in this clause which **creates** a right for them, not seeming to realize that the Fourteenth Amendment is not the creator, but the protector of rights already existing.

If the right of the city to proceed by due process of law to ask the specific performance of these contracts were a real issue here, the question is finally and conclu-

sively settled by the decision of the court in the case of **Interstate Consolidated Street Railway Co. v. Massachusetts,** 207 U. S., 79. This case has been several times quoted in this brief, and it is sufficient to say here that the clear holding in that case, as well as of Ashley v. Ryan, 153 U. S., 436, 443, and of Wight v. Davidson, 181 U. S., 371, 377, is that the acceptance of a charter by a corporation estops it from contesting the validity or constitutionality of the obligations imposed as considerations for the charter. The case here is much stronger in that the company received valuable proprietary rights in consideration for its agreements. These appellants cannot now deny the reasonableness or binding effect of the rates which they offered as a consideration for the grants.

It is futile to cite such a case as Castle v. Mason, 91 O. S., 296, in which the Ohio Supreme Court held that the reasonableness of a statute fixing fees for oil inspection could be determined by its operative effect. This statute was a police measure strictly, and the fees were not agreed to by the parties upon whom they were imposed, nor was there any grant of property rights as a consideration for the fees, which the party intended to hold while denying the validity of the fees.

In other words, for the franchise contracts to constitute such an action by the state or its agency as would justify the invocation of the due process clause, there must have been a pre-existing right. Such a right these appellants did not have. They had no right in the streets except under these franchise grants, and they dedicated their property to public use under the protection and subject to all the obligations of these contracts. The rights created by the contracts were defined and re-

stricted by the mutual covenants and agreements of the parties; so also as to rights in the property dedicated to public use under these franchises.

N. & W. Ry. Co. v. Conley, 236 U. S., 605, is not in point, because the West Virginia two-cent law was purely an exercise of the governmental rate-making power. While the company submitted to a test of the law for two years, it at no time accepted the law. Nor could any binding acceptance be implied, because the company was in existence at the time the act was passed, and received no consideration for submitting to the operation of the law.

Likewise, the company's argument, that the profit it is making in the light and power departments of the business has no bearing on this question, is invalid. In other words, since their sole appeal has been one which should be made to the chancellor, who has been petitioned for the specific performance of the contract, on the ground that performance was rendered impossible by the bankrupty of the company, all the assets of the company must be considered in determining the validity of the plea.

We submit that the following decisions, hereinbefore quoted at length, conclusively prove that appellants have not made a case within the scope of the Fourteenth Amendment:

Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U. S., 79;
Detroit United Ry. Co. v. City of Detroit, 229 U. S., 39;
Cleveland v. Cleveland City Ry. Co., 194 U. S., 517;
City Ry. Co. v. Citizens Street Ry. Co., 166 U. S., 557;
Interurban Co. v. Cincinnati, 93 O. S., 108;
Interurban Co. v. Public Utilities Commission, 98 O. S., 287;

Cincinnati v. Public Utilities Commission, 98 O. S., 320;
Ft. Loramie v. Gress, O. C. A., not yet reported, July 9, 1918;
Knoxville Gas Co. v. Knoxville, 253 Fed., 217;
Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp., Application of Receivers, Sept. 9, 1918, U. S. District Court, Eastern Div. N. Y.

SUMMARY.

In supporting the decisions of the lower courts, sustaining the motions of the city to dismiss these causes, we rely upon three propositions, as follows:

1. The franchise contracts are valid and binding upon both parties for the entire term of twenty-five years each, and, containing agreements on the part of the grantees to operate at the fixed rate of fares during said entire periods, cannot be abandoned by the grantees, their successors and assigns, **without the consent of the city.**

2. If the franchises were merely permissive and gave the grantees the right to surrender at their pleasure, or could be surrendered because of implied conditions, **no cancellation has been effected** by the company's action cause, (a) the consent of the mortgage trustee has not been secured, and (b) the verbal surrender of the franchises is ineffective to relieve the appellants from the obligations thereof while they still maintain their structures in the streets and enjoy all the privileges of operation conferred by the franchises.

3. If cancellation has been legally effected, the appellants have not been deprived of any rights by the City of Columbus, or by any of the other appellees, have not

been deprived of any rights under the Fourteenth Amendment, and have entirely failed to show a right of action in this court.

Appellees therefore respectfully submit that the decrees in the above entitled cases should be sustained.

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